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1894.—VOL. II.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

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OF

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OF

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1894.

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In the Third Series,
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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1894.

[IN THE COURT OF APPEAL.]

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Jan. 29.

STROUD *v.* WANDSWORTH DISTRICT BOARD OF WORKS.

Metropolis—Management Acts—Repairs of Carriage Road—"Necessary Works of Repair"—Apportionment and Recovery of Expenses—Necessity of Works—Jurisdiction—Magistrate—Local Authority—Metropolis Management Amendment Act, 1890 (53 & 54 *Vict.* c. 66), *s.* 3.

Under s. 3 of the Metropolis Management Amendment Act, 1890, which empowers vestries or district boards to execute any "necessary works of repair" upon carriage roads, and to apportion and recover the expenses, it is for the vestry or district board to decide as to the necessity of the works, and they are not bound to prove such necessity to the satisfaction of the tribunal before which they seek to recover the expenses.

Reg. v. *Marsham* ([1892] 1 Q. B. 371) explained.

Decision of Divisional Court (Charles and Wright, JJ.) affirmed.

APPEAL from the judgment of a Divisional Court (Charles and Wright, JJ.). The facts are fully stated in the report of the case before the Divisional Court. (1)

(1) [1894] 1 Q. B. 64.

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Jelf, Q.C., and *Mattinson*, for the appellant. The section in question, s. 3 of the Metropolis Management Amendment Act, 1890 (53 & 54 Vict. c. 66), contains no express power for the local authority to decide as to the necessity of the works, and such a power ought not to be implied. If the legislature had intended to confer such a power, they would have inserted some such words as "shall deem it necessary or expedient," words which are found in another Metropolis Management Act—the Metropolis Management Act, 1862, Amendment Act, 1890 (53 & 54 Vict. c. 54)—passed the same day as the Act above mentioned. It is entirely contrary to the spirit of this kind of legislation to give such arbitrary power to the local authority. In all previous legislation relating to the management of the metropolis, such as the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 105 and 106, and the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102), s. 80, and in legislation extending outside the metropolis, such as the Public Health Act, 1875, s. 150, there are provisions protecting the adjoining owner by requiring notice, and so forth, so that nothing shall be done by the local authority behind his back. If the respondents' contention is correct, the Act now in question does not give the owner a single safeguard against injustice. The argument of inconvenience, alluded to by Charles, J., in the Court below, is unsound; for the previous Acts, especially the Public Health Act, 1875, make ample provision for the settlement of all disputes between the local authority and the owner: *Sandgate District Local Board of Health* v. *Keene*. (1) This case is really covered by *Reg.* v. *Marsham* (2), and, as Wright, J., said, cannot easily be distinguished from it. This is, indeed, an à fortiori case. The statement of Stirling, J., in *Lewis* v. *Weston-super-Mare Local Board* (3), that the persons to judge of the necessity of the works are the local authority, is a mere dictum, and is opposed to *Ex parte Whitchurch* (4), where Stephen, J., considered that the word "necessary" could not be extended to whatever the sanitary authority thought necessary.

Channell, Q.C., and *J. C. Earle*, for the respondents. The

(1) [1892] 1 Q. B. 831.
(2) [1892] 1 Q. B. 371.
(3) 40 Ch. D. 55, 62–3.
(4) 50 L. J. (M.C.) 41.

appellant's view could not be carried out in practice, for the "necessity" of the works would have to be judged of after the works had been completed. To have to decide upon the necessity after the event would also be dangerous to the local authority, for they might run the risk of the expenses being disallowed. Under all Acts of this kind the local authority is the body to decide upon the necessity of the works. In the present instance it is possible that the Acts, or some of them, may not be so worded as to confer such a power upon the local authority, yet, having regard to the scope and object of the legislation, that must be the meaning to be attributed to it, otherwise it becomes unworkable. *Reg.* v. *Marsham* (1) is distinguishable; but, so far as it goes, it is really an authority in favour of the defendants. That case related to a different class of expenses—paving expenses; and the Court held that the local authority must shew that the works done were paving works within the Metropolis Management Acts, and that the money sought to be recovered had been expended in such works; but it was distinctly decided that the local authority was to be the judge of the necessity of the works.

[A. L. SMITH, L.J. How do you account for two Metropolis Management Acts having been passed separately in 1890 and on the same day?]

It is said that one was introduced by a private member of parliament, and the other by the London County Council. But no logical inference can be drawn merely from the difference of language, for the Acts had different objects. "Necessary" must mean necessary in the opinion of the body that has to act upon the assumed necessity. This road is a "street" as defined by s. 250 of the Metropolis Management Act, 1855, and is vested in the local authority, as in *Coverdale* v. *Charlton*. (2)

Mattinson, in reply.

LINDLEY, L.J. This case raises a question of some little difficulty. Shortly stated, the question is, who is to be the judge of the necessity of the repairs to which I will allude presently? The language of the Act of Parliament which we have to construe is to be found in the 3rd section of the Metropolis

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Management Amendment Act, 1890 (53 & 54 Vict. c. 66), which is an Act to amend the Metropolis Management Acts.

The 1st and 2nd sections shew the object, generally, of the Amending Act, and then s. 3 says this: "Any vestry or district board may from time to time execute any necessary works of repair upon any or any part of any carriage road within their parish or district which shall have been used for not less than six months for public traffic, and which may not at the time of such repair have become repairable by them." Then it goes on in another paragraph: "and shall not by undertaking such repair prejudice or affect the powers of such vestry or district board to apportion and recover the expenses of paving such road or way if and when the same shall be paved as a new street under the Metropolis Management Acts."

Then the section proceeds: "The expenses of and incident to such repair may in the first instance be paid by the vestry or district board in the same manner as the expenses of repairing other streets repairable by them, and shall as soon as may be thereafter be apportioned upon and recovered from the owners of the houses and land bounding or abutting on such road or part thereof in the same manner as if such expenses were expenses of paving such road or part thereof as a new street under the provisions of the Metropolis Management Acts relative thereto, and the amount of the expenses so apportioned may be recovered by the vestry or district board in a court of competent jurisdiction." Then there comes a proviso about railway companies, which I need not refer to.

Now, the question is, who is to be the judge of the necessity for these "works of repair"? The answer is to be found by considering the object and purpose of this section. It is, in substance, an addition to a group of sections relating to the paving of streets. Under the earlier Acts there was power to pave streets, but not for doing works of repair before doing paving and other works referred to in those Acts. This section is put in to supplement that defect. Under the Acts 18 & 19 Vict. c. 120, s. 105, and 25 & 26 Vict. c. 102, s. 77, it is clear enough that the judges of the necessity of paving are to be the local authority. In this Act it is not stated in so many words

who are to be the judges of the necessity of works of repair; but, in my opinion, the true construction is that the persons who are to be the judges of the necessity of doing these works are to be the same as those who are to be the judges of the necessity of doing the works under the former Acts. I see no reason for coming to the conclusion that parliament intended that there should be two different judges of similar necessities. If parliament did intend to introduce such a curious anomaly or such complicated machinery, it would have expressed its intention in language which could not be misunderstood.

It is urged in opposition to this that parliament, by changing its language, did really mean to change the judges of the necessity; and reference has been made to the fact, that in the same session another Act, the Metropolis Management Act, 1862, Amendment Act, 1890, (53 & 54 Vict. c. 54), was passed, amending the Act of 1862, and there express words are to be found shewing who are to be the judges of the necessity. That is true; but the explanation of that is tolerably obvious. The real history of it is that s. 1 of the 53 & 54 Vict. c. 54, repeals s. 78 of the Act of 1862, and re-enacts the words, with some alterations. The new section is, substantially, a repetition of the old plus some alterations. This new section is intended to be worked into the previous Act; and I cannot say that the maxim, "Expressio unius est exclusio alterius," applies.

It is said that this view is contrary to the decision of this Court in the case of *Reg.* v. *Marsham* (1), which relates to paving expenses. I do not so consider it. On the contrary, I think it is quite consistent with that case. What that case decided was that, in order to recover the expenses of paving a new street, the local authority must shew that the works done were works within the Metropolis Management Acts, and that the money sought to be recovered from the adjoining owners had been expended in such works. But the Court, in deciding that, expressly stated that the local authority was to be the judge of the necessity of the works. It is quite consistent with that case that there should be thrown upon the local authority in the present case the burden of proof that these repairs were necessary.

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The question still remains, In whose judgment? And my answer is, In the judgment of the local authority; but, in order to recover the expenses of the repairs, they must shew that the money has been expended in such repairs. I think that, not only is this case not concluded by the case of *Reg.* v. *Marsham* (1), but that the reasons I have given afford the true solution of the question we have had to consider. Any other construction of this Act of Parliament would lead to the wildest confusion. This appeal must be dismissed.

KAY, L.J. I have come to the same conclusion. I think the question in this case is one of no easy solution, but this appeal seems to me to be an attempt to carry the decision of the case of *Reg.* v. *Marsham* (1) very much beyond what that decision intended to lay down, and beyond what the learned judges who decided that case themselves expressed as the limit of their decision.

In that case the section to be construed—s. 105 of 18 & 19 Vict. c. 120—and which is set out in a note to the case (page 373), was this: "In case the owners of houses forming the greater part of any new street laid out or made, or hereafter to be laid out or made, which is not paved to the satisfaction of the vestry or district board of the parish or district in which such street is situate, be desirous of having the same paved . . . . or if such vestry or board deem it necessary or expedient that the same should be so paved, then and in either of such cases such vestry or board shall well and sufficiently pave the same." And then, by the subsequent Act, 25 & 26 Vict. c. 102, s. 77, the expenses so incurred by the vestry or board are to be apportioned among the owners of the adjoining houses, and they are to be compelled to pay their proportionate part. In that case an application was made to the magistrate to compel one of the adjoining owners to pay his proportionate part; and Lord Halsbury, then Lord Chancellor, said in giving judgment (page 376): "It is clear that it is part of the duty of a board of works seeking to recover these payments from adjacent owners to establish two things: first, that the subject-matter in

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respect of which the money is claimed is a subject-matter within the jurisdiction, or, in plain terms, that it is paving in respect of which they are seeking to recover; secondly, that the expenses have been actually incurred." But then, a little further on in his judgment, he says: "The board were, in my opinion, bound to shew that these expenses were paving expenses incurred within the statute, though, if they had once proved that fact, I do not in any way say that the magistrate had jurisdiction to inquire into the propriety or extravagance of the expenditure: that might be to embark upon an idle inquiry." Therefore, I take that case to have decided this, that in order to recover the apportioned part from an adjoining house-owner it was necessary to shew that the paving had been done—of course, it was also necessary to shew that the expenses, the share of which it was sought to recover, were expenses in regard to that paving; but it was not necessary to go further and shew that the paving was proper and not extravagant, or anything of that kind. That meant that the local board who did the paving were the body to judge—and had complete jurisdiction vested in them to judge—what was proper to be done in making the pavement. Now, there are no distinct words in the Act giving them that discretion in terms; but the learned judges held that that must be inferred, and that it was the intention of the legislature to vest a certain amount of judgment or discretion in the local board to the extent of determining what was proper paving to be done, and that such discretion was left in the board who had to do that work.

Now we have to apply that to this particular Act of Parliament. Here we have words which are somewhat difficult to construe. The words are, "any vestry or district board may from time to time execute any necessary works of repair upon any or any part of any carriage road within their parish or district which shall have been used for not less than six months for public traffic," and so on. I quite agree that the case of *Reg.* v. *Marsham* (1) decided that, when these expenses had been apportioned and the local board were seeking to recover a proportionate part for the work which had been done by them, they

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would be bound to shew that the repairs had been done and certain moneys had been expended in those repairs; and, having shewed that, it seems to me that the decision in *Reg.* v. *Marsham* (1) is satisfied. The case of *Reg.* v. *Marsham* (1) does not go on to decide, and it is not necessary for the decision of that case to hold, that the word "necessary" in this Act which I have just referred to is also a matter which is to be brought for the decision of a magistrate who is asked to enforce payment of the apportioned part.

Then there remains the question, What did the legislature mean by that word "necessary"? It must be necessary in the judgment of some one. Was it, or was it not, necessary in the judgment of the board who did the work? Primâ facie, one would think that a public body like a local board who had authority vested in them to repair highways which they have not yet determined to pave must have some discretion vested in them. The case of *Reg.* v. *Marsham* (1) clearly shews that the judges in that case considered a certain amount of discretion was vested in the board; and I think that this word "necessary," though it is used in the Act of Parliament without additional words, such as "which they shall think necessary," or, "which shall appear to be necessary," may yet be fairly construed to mean "necessary" in the opinion of the local board who have to take upon themselves to do the work, pay for it in the first instance, then apportion the expenses amongst the householders, and then recover the apportionments from them. I agree with what Lindley, L.J., says, that this is really an addition to that legislative provision which enables the local board at their own discretion to pave a street of this kind, and that this is a sort of preparatory work which they are enabled to do before they take a particular street completely over and pave it. It would seem a very strange thing indeed if we were to construe this Act of Parliament as having this peculiar effect, that although the extent of paving, when they do pave, is to be a thing entirely within the discretion of the local board, what are "necessary" repairs before the paving is a matter which is not to be in their discretion. That would make the provisions of these Acts of

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Parliament strangely anomalous; and, therefore, notwithstanding the criticism which has been very fairly and properly made on this Act of Parliament in comparing it with other enactments in which discretion is expressly given, I cannot bring myself to think that, in this case, the learned judges below were wrong in saying that such a judgment as is involved in the word "necessary" must be a judgment confined to the local board that is to do the works of repair, and is not to be exercised afterwards by the magistrate, which may be a long time after the work has been done, and when proof that it was necessary may be more or less difficult to arrive at. That might cause very expensive and troublesome litigation, because, whenever a householder was called upon to pay a proportionate share of the repairs, he would be able to say they were not necessary. I think that would be a most inconvenient construction of this Act of Parliament, and one that is not, to my mind, sanctioned by the case of *Reg.* v. *Marsham.* (1)

A. L. SMITH, L.J. I also think this appeal must be dismissed. The question which this Court has to decide is, What is the true meaning of s. 3 of the Act of 1890 (53 & 54 Vict. c. 66)? The section runs as follows: "Any vestry or district board may from time to time execute any necessary works of repair upon any or any part of any carriage road." Does this mean that a district board may from time to time execute any works of repair which the board deem necessary, or does it mean that they may from time to time execute any works of repair which a magistrate thereafter shall adjudge to have been necessary? Those are the two readings which the respective parties have put before us.

Now, two arguments have been addressed to us, one by Mr. Mattinson as to the injustice of holding that it means any works of repair which the board deem necessary, because, he says, an owner of a house or land abutting on the road would have no opportunity of discussing the question, or shewing that the works which it was contemplated to carry out were not necessary, the other ab inconvenienti, which was referred to by Charles, J., and certainly fully dealt with by him. I wish,

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however, to say a word about the argument—as to the alleged injustice to a householder who has a house on land abutting on or bounding the road. Now there can be no doubt that, if ever this road gets into the category of a street, the whole paving of it can be done if the vestry think it necessary, although the landowner does not. That is perfectly clear; it is in the very words of the Act, and there can be no controversy about it. Again, in the Act, which was also passed in the year 1890 (53 & 54 Vict. c. 54), it is quite clear that a footway running along land of a landowner can be flagged by a local board without his assent or his having anything to say in the matter.

I come now to the question about repairing a carriage way. The local authority must certainly be trusted to some extent. Under the Act in question (53 & 54 Vict. c. 66), a district board has power to repair it; by previous Acts the board has power to pave a new street and also to flag a footway without consent; why, then, should not necessary works of repair to a carriage road be done by the board without consent?

There is also an observation to be made upon s. 3. In that section it is expressly directed that the district board shall not, by undertaking the repair of a carriage road, prejudice the powers which it possesses of apportioning and recovering the cost of paving the road, if it should be paved as a street, and the section goes on to enact that the expenses of repairing the road shall be recovered in the same way as if the expenses had been the expenses of paving.

Taking all those circumstances into consideration, How is this s. 3 to be read? It seems to me it must be read in the light of the other sections to which I have already referred, and to the effect that any vestry or district board may from time to time execute any works of repair which it may deem necessary.

The case of *Reg.* v. *Marsham* (1) does not touch the present point. That case only decides that when paving deemed by a local authority to be necessary has been done, and that local authority proceeds to get an apportionment of the expenses out of the frontager, it must prove that the paving de facto has been done; that the money has been expended on that paving; and

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that the paving was such as the board deemed necessary; and that the apportionment was proper.

In this case, when it is proved that the repairs which the local board deemed necessary have been done, and that the money has been expended on these repairs, the landowner has no right to interfere, and, as he has not consented, insist that a magistrate should decide if the repairs were necessary or not.

My view is that the apportionment is recoverable, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Rexworthy & Stroud.*
Solicitors for the respondents: *W. W. Young & Son.*

G. L. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1894
March 19; *April* 9.

THURSBY AND ANOTHER, APPELLANTS; CHURCHWARDENS AND OVERSEERS OF BRIERCLIFFE-WITH-EXTWISTLE, RESPONDENTS.

Local Government—Rates—Lighting Rate—Coal Mines—"Land"—"Houses, Buildings, and Property other than Land"—Poor Relief Act, 1601 (43 *Eliz. c.* 2), *s.* 1—*Lighting and Watching Act,* 1833 (3 *&* 4 *Wm.* 4, *c.* 90), *s.* 33.

By the Lighting and Watching Act, 1833, s. 33, it is enacted that, for the purpose of levying the rate necessary for the purposes of the Act, "owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act":—

Held (by Lopes, L.J., and Davey, L.J., the latter hesitating, affirming the decision of Mathew and Collins, JJ.), that coal mines are "property (other than land) rateable to the relief of the poor" within the meaning of the above-mentioned section, and therefore are rateable under that section at the higher rate.

APPEAL from the judgment of a Divisional Court (Mathew and Collins, JJ.) upon a special case stated under 12 & 13 Vict. c. 45, s. 11, on an appeal against a rate made under the Lighting and Watching Act, 1833.

The appellants, who were the proprietors and occupiers of coal mines, had been rated in respect of such mines at the higher rate as being occupiers of "property other than land" within the meaning of s. 33 of the Lighting and Watching Act, 1833.

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The facts are fully stated in the report of the case in the Court below. (1) The Divisional Court held that the appellants were rightly so rated.

Balfour Browne, Q.C., and *W. Graham*, for the appellants. The judges in the Court below start with the assumption that coal mines are not "land" within the meaning of the statute 43 Eliz. But that is a fallacy. The fact that that statute specifically enumerated certain things, which would be included in the word "land," does not take those things out of the category of "land." But, even if the proposition so laid down were true, it does not follow from it that coal mines are not to be treated as land for the purposes of the Act now in question. That Act must be construed with reference to its object, which is to make property which receives greater benefit from the lighting subject to a higher rate. Coal mines underground receive no benefit.

The cases of *Reg.* v. *Overseers of Neath* (2) and *Reg.* v. *Midland Ry. Co.* (3) are distinct authorities to the effect that "property other than land" in the section now in question means property ejusdem generis with "houses" and "buildings." Coal mines are not such property. The distinction as laid down by those cases is really between land built upon and land not built upon, the reason for it being that the benefit to be derived from the lighting is greater in the case of the former. If the respondents' contention were right, saleable underwoods, being specifically mentioned in the statute of Elizabeth, would be rated for lighting purposes at three times the value of other land, which would be unreasonable. [They also cited *Reg.* v. *Southwark and Vauxhall Water Co.* (4)]

Castle, Q.C., and *William Mackenzie*, for the respondents. The distinction made in s. 33 must be considered as relating to the provisions of the Act of Elizabeth. Coal mines are not rateable as "lands" under that Act, but as property specifically mentioned in the Act. That mines are not "lands" within the meaning of that Act was shewn by the decisions, in which it was

(1) [1894] 1 Q. B. 567.
(2) Law Rep. 6 Q. B. 707.
(3) Law Rep. 10 Q. B. 389.
(4) 6 E. & B. 1008.

held that mines other than coal mines were not rateable to the relief of the poor: see *Morgan* v. *Crawshay*. (1) Coal mines, therefore, come within the words "property (other than land) rateable to the relief of the poor." It is impossible to make the benefit received from the lighting the test by which to determine the meaning of the section. Many cases might be suggested in which it might be argued that little or no benefit was received from the lighting, and yet the property would be clearly the subject of assessment at the higher rate. The cases of *Reg.* v. *Overseers of Neath* (2) and *Reg.* v. *Midland Ry. Co.* (3) are distinguishable, and do not govern the present case. In those cases the properties in question were respectively a canal and a railway. Neither a canal nor a railway is specifically mentioned in the statute of Elizabeth, and such a property could not be called a building, and therefore it could only be rated as land. The suggestion that "property other than land" meant property ejusdem generis with "houses" and "buildings" was therefore really unnecessary for the decision of those cases, and must be treated as being a mere dictum. The ejusdem generis doctrine only applies where a description of an indefinite nature is used. It is submitted that the meaning of the term "property (other than land) rateable to the relief of the poor" is clear and definite, having regard to the provisions of the statute of Elizabeth.

The provisions of the Act 14 & 15 Vict. c. 50, clearly assume that tithes were rateable at the higher rate, under s. 33, and provide that they shall not be so in future. If they were so rateable, how can it be contended that coal mines are not? [They also cited *Peto* v. *West Ham*. (4)]

Balfour Browne, Q.C., in reply. The ground on which it was held that mines other than coal mines were not within the statute of Elizabeth was, not that they were not land, but that the express mention of coal mines impliedly excluded other mines: see *Lead Smelting Co.* v. *Richardson*. (5)

The judgments in *Reg.* v. *Overseers of Neath* (2) and *Reg.* v.

(1) Law Rep. 5 H. L. 304.
(2) Law Rep. 6 Q. B. 707.
(3) Law Rep. 10 Q. B. 389.
(4) 2 E. & E. 144.
(5) 3 Burr. 1341.

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Midland Ry. Co. (1) were expressly based on the ejusdem generis doctrine.

Cur. adv. vult.

April 9. The following written judgment was delivered by—

LOPES, L.J. This is a special case raising an important question, viz., whether the appellants' coal mines are liable to be rated on the higher rate chargeable by s. 33 of 3 & 4 Wm. 4, c. 90, the Lighting and Watching Act, 1833. The Divisional Court has held that the appellants are liable to be rated at the higher rate as coming within the words "owners and occupiers of houses, buildings, and property other than land."

The reasoning of the learned judges in the Court below appears to be that, because coal mines are specifically mentioned in the statute of Elizabeth in addition to lands, therefore they cannot be regarded as land under the Lighting and Watching Act, but must be included in the general words, "property (other than land) rateable to the relief of the poor," which follow the words "houses, buildings," and therefore subject to the higher rate. The early part of s. 33 is mere procedure, and affords no assistance in determining what property is subject to the higher and what to the lower rate. Then come these words of the proviso: "Provided always that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act." Who are to pay the higher rate? Why, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor. That must mean property rateable to the relief of the poor under the statute of Elizabeth, which is not described therein as land, but as tithes, coal mines, and saleable underwoods, which are placed in the same category with houses and lands, and together form the five subject-matters to which the poor-rate attaches under that statute. The statute 14 and 15 Vict. c. 50, affords a very strong argument that this is the proper construction to be placed on

(1) Law Rep. 10 Q. B. 389.

the word "property" in this section. This statute assumes distinctly that tithes, being property other than land, were rateable under the Lighting and Watching Act at the higher rate, and, recognising this injustice, the legislature places them on the same footing as land. If the legislature regarded tithes as coming within the word "property," and rateable under the Lighting and Watching Act on the higher scale, how can coal mines, which are under the statute of Elizabeth in the same predicament with tithes, be relieved? They are both specifically mentioned, and are both specifically rateable under that Act, and coal mines are not, like tithes, within the relief afforded by this Act.

It is to be observed the language of the old Lighting and Watching Act (11 Geo. 4, c. 27), s. 25, is different from that of s. 33 of the Act we are now considering. The words there are, "owners or occupiers of houses, buildings, and other property rateable to the relief of the poor." The words "other than land" are omitted. The language of this Act would clearly make coal mines rateable at the higher scale. Mathew, J., places some reliance upon this; but I do not think much reliance is to be placed on the language of a repealed statute when we have to construe the language of a statute by which it is repealed.

We have been much pressed by certain decisions which have placed a construction upon the words in question and especially the cases of *Reg.* v. *Overseers of Neath* (1), where it was held that "property" meant things ejusdem generis with houses and buildings, and did not include a canal and towing path, and also *Reg.* v. *Midland Ry. Co.* (2), where it was held that a line of railway was land within the meaning of the section, and was therefore only rateable at the lower rate. Blackburn, J., says in the latter case: "I cannot come to the conclusion that in considering s. 33 of the Lighting and Watching Act we can say that in the words 'houses, buildings, and property other than land,' and 'land,' the antithesis is between land in its natural state or in an agricultural state, and land in which any money has been invested for commercial purposes; I think the

(1) Law Rep. 6 Q. B. 707. (2) Law Rep. 10 Q. B. 389.

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distinction is between land, which is the general word, and land which has been built upon. Such property is either a house or building, or something which for any reason is not a building—a house or things ejusdem generis; and I think neither a railway nor a canal could be considered as a building in that sense." I feel the force of this reasoning; but the Court in the first case was dealing with a canal, and in the second case with a railway, subject-matters not specifically dealt with by the statute of Elizabeth, and only rateable as land in the ordinary acceptation of that description. For the purposes of the decision of those cases it was only necessary to hold that the railway and canal were not houses or buildings, but land. The Court was not embarrassed with something which was treated by the statute of Elizabeth as rateable independently of being land, and which came within the description of being property specifically mentioned as being rateable to the relief of the poor. All they had to decide was whether something which was capable of being designated as land and was not distinguished from land in the statute of Elizabeth was to be regarded as land or as a house or building. These decisions for some time created grave doubts in my mind; but I have come to the conclusion that, if the judges in those cases had been called upon to decide whether a coal mine, which is specifically mentioned in the statute of Elizabeth, and made rateable as a coal mine, independently of its being land, came within the words "property (other than land) rateable to the relief of the poor," they would have decided that question in the affirmative. A coal mine is not a house, it is not a building, it is not regarded as land or made rateable as land under the statute of Elizabeth; but it is property rateable to the relief of the poor under that statute, and therefore, in my judgment, to be rated at the higher scale. I am of opinion that the appeal fails, and the judgment of the Court below must be affirmed.

DAVEY, L.J. I do not disagree with the judgment of the Lord Justice, which has just been read, concurring with the judgments of the learned judges in the Divisional Court. Apart from any decision on the statute, I should say that the

words in question included all property of every description rateable under the Act of Elizabeth or any subsequent Act, and that it is a reasonable construction of the words "other than land" to construe them with reference to the Rating Acts, and to hold that what is intended to be excepted is property rateable as land. Coal mines, being expressly mentioned, are separately rated, and not rated as land, although, like saleable underwoods, they are in fact land. But I cannot help seeing that, although the decisions in the Queen's Bench cases which have been referred to do not touch this case, yet we are, in fact, differing from the construction of the proviso adopted and laid down with some variation by judges of so great eminence as Lord Campbell, Erle, J., and Lord Blackburn. Nor do I think that the effect of that observation is altogether got rid of by saying that they might have come to the same conclusion on the cases before them without adopting that construction; and I feel some hesitation in differing from those judges. As, however, my learned brother agrees with the Divisional Court, my hesitation will have no effect, and it is of the less importance because my experience in such cases as this is not, of course, to be compared with that of the judges in the Court below and my learned brother.

Appeal dismissed.

Solicitors for appellants: *Littledale & Lefroy, for Artindale & Southern, Burnley.*

Solicitors for respondents: *Warriner & Kinch, for T. Nowell, Burnley.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1894
March 8, 9.

RAMSAY *v.* MARGRETT.

Bill of Sale—Registration—Sale of Goods—Receipt for Purchase-money—Possession—Husband and Wife—Separate Estate of Wife—Bills of Sale Act 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8.

A wife, who had separate estate, agreed to purchase from her husband some furniture and other personal chattels belonging to him, which were in the house in which she lived with him. She stipulated that a receipt for the purchase-money should be given to her, and instructed her solicitor to draw the receipt. After the purchase-money had been paid to the husband he signed a receipt which the wife's solicitor had prepared. This document acknowledged the receipt from the wife of the agreed sum, as the purchase-money "for all my furniture, plate, &c., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband to the wife, but they remained, as they had previously been, in the house in which the husband and the wife were living together. She subsequently sent part of the goods to her own bankers, and the remainder were afterwards taken in execution by a judgment creditor of the husband. In an interpleader issue between the wife and the execution creditor:—

Held, that the receipt, notwithstanding the words at the end of it, did not form part of the transaction passing the property in the goods to the wife, but that the property had passed to her by the prior and independent bargain, and that consequently the receipt did not require registration under the Bills of Sale Act, 1878, and the wife was entitled to the goods as against the execution creditor:

Held, by Lord Esher, M.R., and Davey, L.J. (Lopes, L.J., expressing no opinion on this point) that the wife had a sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title.

APPEAL against the judgment of Wright, J., at the trial of an interpleader issue, the question being, whether certain furniture and effects, which had been taken in execution by a judgment creditor of Sir Alexander Ramsay, were the separate property of his wife, Lady Ramsay. The learned judge held that the furniture and effects were the property of Lady Ramsay, and that the defendant (the judgment creditor) could not take them in execution.

The defendant appealed.

Lady Ramsay had separate estate, including some furniture which was in the house in which she and her husband lived.

The house was taken in his name, but she paid the rent of it. All the other furniture and effects in the house were the property of the husband. In August, 1892, he was being pressed by some of his creditors, and was in want of money. For the purpose of assisting him she, after consulting her solicitor, agreed to purchase his furniture and effects for 1700*l.*, which was considered to be their full value. She paid him 500*l.* on August 3, and the remaining 1200*l.* on August 8, having borrowed money from her bankers to enable her to do so. She stipulated that her husband should give her a receipt for the money, and requested her solicitor to draw up the receipt, but the money was paid before the receipt was given. The following document was drawn up by the solicitor, and was signed by the husband:—

"Received this 8th August, 1892, from Lady Caroline Charlotte Ramsay, the sum of 1200*l.*, making, with the sum of 500*l.* paid to me on the 3rd inst., the sum of 1700*l.*, in payment of the agreed purchase-money for all my furniture, plate, linen, china, glass, ornaments, pictures, silver, books, plants, musical instruments, and other household and garden effects, at No. 2, Montpellier Parade, Cheltenham, which I hereby acknowledge are now absolutely her property." There was no formal delivery by the husband to the wife, but after the purchase the goods remained, just as they had been before, in the house in which the husband and wife lived together. In May, 1893, Lady Ramsay insured the goods against fire in her own name. In July, 1893, she sent a part of the goods to her own bankers.

After this the defendant levied execution in respect of a judgment debt of the husband upon the goods which remained in the house. The goods were claimed by Lady Ramsay, and the interpleader issue was directed to try the right to them. The defendant contended that the property passed to Lady Ramsay by the receipt, and that the receipt ought to have been registered as a bill of sale, and that, as it was not, it was as against him void under s. 8 of the Bills of Sale Act, 1878, no sufficient possession of the goods having been taken by Lady Ramsay.

The learned judge was of opinion that Lady Ramsay and her husband had told the truth, and by their evidence he was satisfied that she purchased the property in a bonâ fide manner,

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giving for it the price which in her judgment it was worth, and that she only intended to obtain an ordinary receipt for the money, so that she might be able to shew that she had paid it. The sale was effected and the money was paid at once, and was not withheld till the receipt had been given to her. Therefore the learned judge was satisfied that the transaction of sale was complete apart from the document, and that registration under the Bills of Sale Act was not required.

The defendant appealed.

Herbert Reed, Q.C., and *A. T. Lawrence*, for the defendant. By s. 4 of the Bills of Sale Act, 1878, the expression "bill of sale" includes "receipts for purchase-moneys of goods." (1) The title of the plaintiff as transferee of the goods depended upon the receipt which her husband signed. It was "a muniment or document of title," to use the words of Cotton, L.J., in *Marsden*

(1) By s. 4: "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred."

Sect. 8: "Every bill of sale to which this Act applies shall be duly attested and shall be registered under this Act, within seven days after the making or giving thereof, and shall set forth the consideration for which such bill of sale was given, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs, officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be) and after the expiration of such seven days are in the possession or apparent possession of the person making such bill of sale or of any person against whom the process has issued under or in the execution of which such bill has been made or given (as the case may be)."

v. *Meadows.* (1) The receipt was an essential part of the transaction, which could not be proved without it. It amounted in fact to an "assurance" of the goods, and as such was a "bill of sale:" *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (2) After the purchase by the plaintiff there was no change in the ostensible possession of the goods; there was no delivery of possession to the plaintiff, but the goods remained in the husband's apparent possession in his house.

Douglas Walker, Q.C., and *Muir Mackenzie*, for the plaintiff. Since the Married Women's Property Act, it is competent to a husband and wife to make a bargain of this kind, and it is good as against his execution creditor. Wright, J., has found that the transaction was a bonâ fide one, and that the giving of the receipt was not a condition precedent to the passing of the property to the wife. The transaction of purchase and sale was entirely independent of the receipt, and was complete before it was given. The plaintiff had a complete title, and had possession of the goods before the receipt was given, and her title did not depend upon it. It was not an "assurance" of the goods. Therefore the Bills of Sale Act does not apply, and, there being no bill of sale requiring registration, no question of "apparent possession" arises. The question is, whether, as between the husband and the wife, he could be heard to say that he had not given possession to her: *Charlesworth* v. *Mills.* (3) There is nothing now in the relation of husband and wife to prevent the goods being in her possession after the property in them had passed to her. She exercised acts of ownership over them. Either the possession of the husband was that of the wife, or he held the goods as her bailee. In a case in which the possession is doubtful, it will be held in law to follow the legal title: *Jarman* v. *Woolloton.* (4) That doctrine applies now as between husband and wife, just as between any other persons.

A. T. Lawrence, in reply. It is not enough to shew that the possession might be in the wife; the requirements of the Act must be satisfied. No doubt, when goods are sold and delivered to the buyer, the Bills of Sale Act does not apply, even if a

(1) 7 Q. B. D. 80, at p. 85.
(2) 35 Ch. D. 191; 13 App. Cas. 554.
(3) [1892] A. C. 231.
(4) 3 T. R. 618.

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receipt for the purchase-money or some other document be afterwards given by the seller to the buyer. But here there was no delivery of the goods to the buyer. If the document was a "bill of sale" within sect. 4, the giving of possession is immaterial, if the apparent possession is unaltered. There was never any ostensible change of possession here. The Married Women's Property Act was not intended to repeal the Bills of Sale Act.

[LOPES, L.J., referred to *Ancona* v. *Rogers*. (1)]

The ordinary law as to possession does not apply to such a case as this. The question is one of apparent possession. *Charlesworth* v. *Mills* (2) was not a case of an execution creditor; the question there arose between two independent purchasers. In the present case there was no independent transaction before and apart from the receipt; it was a term of the bargain that the plaintiff should have a receipt for the money, and her title was not complete without it. She instructed her solicitor to prepare the receipt, and she accepted the document which he prepared, which is not a simple receipt for money. She cannot now say that it is not the document which she intended to have.

LORD ESHER, M.R. The first question, as it seems to me, is, what is the real meaning of the decision of Wright, J.? He had to try an interpleader issue without a jury, and, therefore, as regards the decision of matters of fact, he stood in the same position as if he were a jury. An appeal lies upon his findings of facts. On that appeal the question before us is, Was he justified in finding the facts as he did? I understand him to have found that the plaintiff, Lady Ramsay, was a married woman who had separate property of her own. She had paid a number of debts of her husband, and she could no longer go on paying his creditors with her money. She agreed with him, in perfect honesty and good faith, to purchase some furniture and plate and other effects which belonged to him. She said she would give him a fair price for the goods—their full value—in order that he might be able to pay his creditors—that is, those who were pressing him for payment.

(1) 1 Ex. D. 285. (2) [1892] A. C. 231.

He agreed to sell the goods to her on those terms, and she paid him the money for them; but she said that she must have a receipt for the money. The learned judge has found that what she asked for was an "ordinary" receipt—that is, a receipt for the money agreed upon as the price of the goods. Then she instructed her solicitor to draw up the receipt, and he drew up a receipt for the money. But at the end of it he added some words which amounted to an admission by the husband that he had sold the goods to his wife, and that they were absolutely her property. These are the facts as the learned judge has found them, and there is no reason to suppose that he has not found them rightly. There was no reason for doubting the truthfulness of the story which was told by both husband and wife, and the story is corroborated by the cheques which she drew in order to pay the purchase-money.

These being the facts, what is the law applicable to them? It is said that, notwithstanding the purchase by the wife, a creditor of the husband is entitled to take, under an execution for a debt of the husband, the goods which the wife has paid for. On what ground? Not on the ground that the wife has not paid for the goods, nor on the ground that the husband did not intend to pass the property in them to her, but because he gave her a document which is a "bill of sale" of the goods within the meaning of s. 4 of the Bills of Sale Act, 1878. That document is not, in fact, a bill of sale—that is, a document by virtue of which alone the property in goods passes from one person to another. But under certain circumstances such a document is, by s. 4, to be deemed to be a bill of sale. Under what circumstances? The last authority on the point is the decision of the House of Lords in *Charlesworth* v. *Mills* (1). It seems to me that the rule as there laid down by Lord Herschell is this: if a document is intended by the parties to it to be a part of the bargain to pass the property in the goods, then, whatever the form of the document may be, even if it be only a simple receipt for the purchase-money, it is, by s. 4, to be deemed to be a bill of sale, though it is not so in fact. But, if the document is not intended to be part of the bargain to pass the property in the

(1) [1892] A. C. 231.

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goods—if the bargain is complete without it, so that the property passes independently of it—then it is not to be deemed to be that which it is not in fact—a bill of sale. That is the test to be applied. If a purchaser of goods asks the vendor for a simple receipt for the purchase-money, is that receipt part of the bargain to pass the property in the goods? It seems to me it would be absurd to say that it is. When you have paid the price of goods which you buy in a shop and you ask for a receipt for the money, is that receipt part of the bargain to pass the property in the goods? Certainly not. Suppose you agree to buy a horse for 80*l.*, and you pay the money and say to the vendor, Send me a receipt for it, is that receipt part of the bargain to sell the horse? It would be a perversion of the Bills of Sale Act to say that it is. If Lady Ramsay had said to her husband, I will not pay you the money until you give me an inventory of the goods with a receipt for the money, the document would then have been part of the bargain to pass the property, and so indeed might a mere receipt for the money, if she had declined to take the goods until a receipt had been given to her. But that which is not really a bill of sale cannot be deemed to be a bill of sale, if it is not part of the bargain to pass the property in the goods. On this ground alone—the finding of the judge that there was no "assurance" of the goods within the meaning of s. 4—his decision was right.

But it is said that the goods remained in the "apparent possession" of the husband, and reliance is placed on s. 8 of the Bills of Sale Act. But that section speaks of the "apparent possession of the person making such bill of sale," and if there is no bill of sale the section does not apply. If, according to the rule which I have stated, the document is not to be deemed to be a bill of sale, s. 8 does not apply, and "apparent possession" has nothing to do with the matter. The case is left to the ordinary law, and the creditor of A. cannot seize the goods of B. to pay A.'s debt.

But, if it were necessary that possession of the goods should be given by the vendor to the purchaser, in my opinion possession was given in the present case. This raises a serious question as between husband and wife, a question which could not have

arisen before the Married Women's Property Act. Before that Act a married woman could at law have no personal property, but, in order to secure to her the equitable interest in property, it was vested in trustees for her, and then at law the property was not hers but that of the trustees. If money was bequeathed to a married woman without the intervention of trustees it went to her husband. The Married Women's Property Act was passed to alter this state of the law, and now by virtue of that Act money and other personal property of a married woman does not pass to her husband. For this purpose a married woman and her husband are no longer in law one person; they are two persons, just as if they were two men. So in this case the money which the plaintiff had was her money, and the furniture was her husband's, and she had the right to buy with her money whatever she chose. When she bought these goods from her husband and paid him the price, they became her separate property. The goods were in the house in which the husband and the wife were living together, and in that state of things you could not say which of them had the actual possession of the goods. What is the rule of law as to possession in such a case? When the possession is doubtful it is attached by law to the title. Therefore, under such circumstances, the law considers the goods to be in the possession of the wife, who has the legal title to them. This consideration again is sufficient to oust the claim of the execution creditor. In either view of the case the judgment of the learned judge is right, and the appeal fails.

LOPES, L.J. The learned judge found these facts: that the transaction between the plaintiff and her husband was a bonâ fide one, and that the document in question was not an "assurance," but only an ordinary receipt for money. The question is raised, whether possession of the goods was given by the husband to the wife. The husband and the wife were living as man and wife in the house in which the goods were. This raises to my mind a difficult question as to the "apparent possession" of the goods. It is, however, unnecessary for me to express any opinion upon this point, and I refrain from doing so, for I think the other point is clear. Was, then, the document in question

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an "assurance" of the goods? Was it part of the transaction passing the property in them from the husband to the wife? I think that is the true test. The learned judge held that the document was a simple receipt for the purchase-money. Was he right in so holding? There are several ways in which this may be tested. Was it necessary to look at this document in order to prove the plaintiff's title to the goods? I think not. Did the document transfer, or was it intended to transfer, any property in the goods? I think not. In my opinion, therefore, it was not a "bill of sale" within s. 4. I think this view is borne out by *Charlesworth* v. *Mills*. (1) In that case Lord Herschell said, at p. 241: "Now, this document, beyond all question, was not a document which was intended to transfer, or did transfer, the property in these goods; because if there is anything clear in the transaction it is this, that, at the time at which this document, whatever its effect, began to operate, Charlesworth was in possession of the goods under an arrangement by which he was to have, for certain purposes at least, a title to them. He did not get his title under that document, he got his title by virtue of the transaction, and the document never began to operate at a time at which he had not possession." Those observations apply to the present case, which, in my opinion, is brought well within that decision, and I think the document did not require to be registered as a bill of sale. This is sufficient to dispose of the appeal.

DAVEY, L.J. I am of the same opinion. The first question is, whether the transaction is one which comes within the scope and purview of the Bills of Sale Act. In my opinion it does not. It was held by this Court in *Ex parte Hubbard* (2), and their view was confirmed by the House of Lords in *Charlesworth* v. *Mills* (1), that the Bills of Sale Act does not apply to transactions in which the property in goods passes accompanied with possession, but that it applies only where the property passes without possession. In the present case the question of possession arises in a peculiar way; it could only arise as between husband and wife since the Married Women's Property Act.

(1) [1892] A. C. 231. (2) 17 Q. B. D. 690.

The plaintiff had separate estate, and she purchased from her husband goods which were then in their common use in the conjugal domicil, and the goods remained there after the purchase. How does the question of possession stand upon principle? In Littleton on Tenures, s. 701, it is said: "Where two be in one house, or other tenements, and the one claimeth by one title, and the other by another title, the law shall adjudge him in possession that hath right to have the possession of the same tenements." A passage has been read from a very learned work on Possession (Pollock and Wright on Possession) in which the rule is thus stated (at p. 24), "Where possession in fact is undetermined, possession in law follows the right to possess," and the following dictum of Maule, J., in *Jones* v. *Chapman* (1), is cited: "It seems to me that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser." Mr. Lawrence says that rule applies only to real estate. I can see no reason why the same principle should not be applied to personal chattels, the situation of which is consistent with their being in the possession of either of two persons. Mr. Lawrence says that there was no apparent change of possession after the purchase by the plaintiff, but that the ostensible possession remained just as it was before. Was it necessary that there should be any change in the ostensible possession? The law is thus laid down by the present Lord Chancellor in *Charlesworth* v. *Mills* (2): "The question whether it is a possession which excludes the apparent possession of the other party might arise under the Act of 1878; but it is not of the slightest importance in the present case. Is it a possession as between the person giving it and the person taking it?

(1) 2 Ex. 803, at p. 821. (2) [1892] A. C. at p. 242.

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When once it is admitted, as it was inevitably admitted by the learned counsel for the respondent, that it was a possession sufficient as between those persons to constitute a good pledge, it seems to me that the case is at an end. I say 'inevitably admitted,' because how can it be disputed that as between the two parties to the transaction it would have been impossible for the person who had received an advance on giving this possession to say that he had not given the other person possession of the goods which would entitle him to hold them as a security for the advance? And that is all that a pledge is." I understand Lord Herschell to mean that the question is, whether the transfer of the goods was accompanied by such a possession as takes the case out of the Bills of Sale Act, and that you need not enquire who had the apparent possession, but only whether there was a possession as between the person giving it and the person taking it. Here the goods were in the conjugal domicil, and were being used by the husband and the wife for the purposes of that domicil. Under the circumstances I draw the inference, and I think it is an irresistible inference, that the intention was that the goods should become the separate property of the wife out and out, in the same way as the other separate property which belonged to her, and was in her possession. In other words, the intention was that both the property in the goods and the possession of them should pass at once to the wife. And this intention was carried out, for she appears to have exercised the power of disposition of the goods without any consent of her husband. The fact that the goods remained in the house as before was equally consistent with their being in her possession as with their being in his possession. If there had been a formal delivery of the goods to the wife, there could have been no question, but I do not think that such a delivery was necessary. I should, therefore, be prepared to hold that the plaintiff had a sufficient possession of the goods to take the case out of the Bills of Sale Act. But I agree with my learned brethren on the other point. I think that the document was intended to be only a simple receipt for the purchase-money, and that the words which were added at the end were not part of the transaction which passed the property in the goods. It

has been decided that the definition of a "bill of sale" which is contained in s. 4 of the Bills of Sale Act, 1878, and which includes "receipts for purchase-moneys of goods," applies only to receipts which are intended to operate as "assurances." As Bowen, L.J., said in *North Central Wagon Co.* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (1), "a document must be an assurance to operate as a bill of sale." I may refer also to the judgments of Jessel, M.R., and Bramwell, L.J., in *Woodgate* v. *Godfrey.* (2) I agree with Wright, J., that the receipt in the present case was never intended to form part of the transaction which passed the property in the goods, but that there was an independent bargain and sale which was intended to pass the property. In my opinion the plaintiff only intended to have a simple receipt for the purchase-money, and, even if it was necessary that she should have possession of the goods, which I think it was not, in my opinion they were in her possession, and the Bills of Sale Act does not apply.

Appeal dismissed.

Solicitors: *G. S. Warmington & Co.; Smythe & Brettell.*

(1) 35 Ch. D. 191, at p. 213. (2) 5 Ex. D. 24.

W. L. C.

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March 14.

[IN THE COURT OF APPEAL.]

CROZAT *v.* BROGDEN.

Practice—Security for Costs—Plaintiff resident out of the Jurisdiction—Action on Foreign Judgment.

Where a person resident out of the jurisdiction brings an action in this country, the fact that the action is brought on a foreign judgment, recovered in proceedings in which the defendant appeared, does not affect the right of the defendant to security for costs.

APPEAL from an order in chambers requiring the plaintiff to give security for costs.

The defendant, who had purchased certain gasworks situate in France, employed the plaintiff to re-sell the said gasworks for him in consideration of a commission of one-third of the net profits of such re-sale. By the terms of the employment it was agreed that the plaintiff should not enter into a contract of sale which did not provide for the deposit by the proposed purchaser of a sum of 10,000 francs in cash. The gasworks having been resold to Messrs. Georges & Co., the plaintiff brought an action against the defendant in the Court of the Tribunal Civil of the Seine to recover a sum of 27,000 francs, which he claimed to be one-third of the net profits of such re-sale. The defendant appeared and defended the action upon the ground that the gasworks were not sold through the agency of the plaintiff; and he also counter-claimed against the plaintiff for damages for having entered into a contract of sale of the said gasworks to one Tarride (which contract was never carried out), and for having accepted in lieu of a deposit of 10,000 francs in cash a deposit of ten shares of 1000 francs nominal value each in a certain company, and, further, for having allowed the deposit of such shares with a certain person who had no authority from the defendant to accept such deposit, whereby the same were lost to the defendant. The Court gave judgment for the plaintiff on the claim for a sum of 11,735 francs, and, as to the counter-claim, held that the acceptance of the deposit of shares in lieu of cash was with the authority of the defendant, and that such shares had in fact been received by the defendant. The defendant

appealed to the Court of Appeal in Paris, and the plaintiff also entered a cross-appeal on the ground that the Court had estimated the one-third net profits at too low a figure. The appeals were heard, and the Court of Appeal dismissed the defendant's appeal, and on the plaintiff's cross-appeal increased the amount of the judgment to 20,641 francs. Upon that judgment the plaintiff, who was a Frenchman resident in France, brought the present action in the High Court in England. The defendant in his defence admitted the fact of the judgment, but alleged that it had been obtained by the plaintiff's fraud in misleading the Court by false assertions that the gasworks had been sold through the agency of the plaintiff, that the defendant had authorized the acceptance of the deposit of shares in lieu of cash under Tarride's contract, and that such shares had been received by the defendant, and also by suppressing certain letters whereby the Court of Appeal were induced to over-estimate the amount of the net profits of the re-sale. The defendant also counterclaimed for the 10,000 francs which he alleged he ought to have received under the contract with Tarride.

When the action was commenced the defendant obtained an order from the master at chambers that the plaintiff should give security for costs. The plaintiff applied for judgment under Order XIV. which was refused by the master, and his order was confirmed by the judge at chambers, the Divisional Court, and the Court of Appeal. The defendant then applied that the security should be increased on the ground of the expense incurred in opposing the proceedings of the plaintiff to obtain judgment. The defendant obtained an order to increase the amount of the security by a sum of 80*l.*, and on appeal that order was affirmed by Grantham, J.

The plaintiff appealed.

1894. Feb. 8. *Crump, Q.C.*, and *Atherley Jones*, for the plaintiff. The rule requiring security for costs to be given by a plaintiff resident out of the jurisdiction is not an inflexible rule. It may be that it applies to all cases in which the matters in dispute are being litigated for the first time, and in which, consequently, there is no greater presumption in favour of one party than of

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the other. But it is otherwise where, as in the present case, the matters have already been fought out by the same parties in another Court. The plaintiff having already obtained judgment in the French Court, there is a presumption that he will equally succeed here. He ought not, therefore, to be ordered to give security. Moreover, as the defendant admits the fact of the judgment, the plaintiff has nothing to prove. The whole onus is on the defendant, who is therefore the real plaintiff.

[He referred to *Ferguson* v. *Kootenay Smelting and Trading Syndicate* (1) and *Re Contract and Agency Corporation.* (2)]

E. F. Spence, for the defendant. There is nothing in the present case to take it out of the general rule. A plaintiff residing out of the jurisdiction is in no better position by reason of his cause of action being founded on a judgment than he would be if he were suing on a simple contract. A foreign judgment is, for the purposes of Order III., r. 6, treated as an ordinary contract debt. The mere fact that in the present case the onus is on the defendant is immaterial. It would equally be so in an action on a bill of exchange; but it could not be contended that in such a case the plaintiff, if resident out of the jurisdiction, would not be required to give security. Unless security is given here, the defendant, if successful, will be unable to get any costs, for the judgment in France in the plaintiff's favour would still be outstanding, and the Courts there would refuse to recognise its reversal by the English Court.

MATHEW, J. I am of opinion that this appeal must be allowed, and the order of Grantham, J., increasing the security to be given by the plaintiff, reversed. It is obvious that what the defendant desires is to have a re-trial of matters that have already been gone into and decided by the French Courts; and the suggestion is that he may be able to produce further evidence in addition to what was before the French Courts, and thereby induce this Court to arrive at a different conclusion. But the presumption is that the decision of the French Courts was right. Under these circumstances the defendant is not entitled to the security which he asks for.

(1) 36 Sol. J. 461. (2) 57 L. J. (Ch.) 5.

COLLINS, J. I am of the same opinion. The argument for the defendant goes the length of affirming that a person who sues here on a judgment recovered in a foreign Court stands in no better position than one who sues here upon an obligation which has not been the subject of a judgment. But however low a foreign judgment may be put, it cannot be put as low as that. It may be that such a judgment does not create an estoppel, as was at one time thought to be the case, but at least it is strong primâ facie evidence in favour of the party who has obtained it, if the other side appeared and litigated the matters in dispute. We are not here dealing with a judgment obtained in default of appearance. The matter was fought out in the Court of first instance, and again in the Court of Appeal; and in the course of those inquiries all the points which are now urged for the consideration of the English Court must have been before the French Courts and dealt with by them. Therefore, there being a strong primâ facie presumption that the defendant will fail in his defence to the action, I do not think he is in a position to insist upon security for costs.

J. F. C.

The defendant appealed.

1894. March 14. *Lawson Walton, Q.C.*, and *E. F. Spence*, for the defendant. A person instituting legal proceedings in this country, and residing abroad, is compelled to give security for costs. That is the rule as laid down by Jessel, M.R., in *In re Percy and Kelly Nickel, Cobalt, and Chrome Iron Mining Co.* (1), and the only exceptions to its generality have arisen in cases in which the defendant already had some security, either because he owed the plaintiff money which he could retain: *Re Contract and Agency Corporation* (2); or the plaintiffs had sufficient property within the jurisdiction which might be taken in execution: *Edinburgh and Leith Ry. Co.* v. *Dawson.* (3) The fraud of the plaintiff before the foreign Court would, if proved, be a good defence to this action: *Abouloff* v. *Oppenheimer* (4); *Vadala* v. *Lawes.* (5)

(1) 2 Ch. D. 531.
(2) 57 L. J. (Ch.) 5.
(3) 7 Dowl. 573.
(4) 10 Q. B. D. 295.
(5) 25 Q. B. D. 310.

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Crump, Q.C. (*W. Geary*, with him), for the plaintiff. A foreign judgment stands on a different footing from other claims by foreigners, for it is according to the comity of nations to enforce such judgments.

[He cited *Williams* v. *Jones* (1); *The City of Mecca* (2); *Godard* v. *Gray*. (3)]

LORD ESHER, M.R. I am of opinion that this appeal must be allowed. In this case we do not know the grounds upon which Grantham, J., came to his decision; but the Divisional Court have set aside that decision, and we have heard their reasons for so doing.

I myself am inclined to think that it was a matter of discretion in the Divisional Court; I cannot quite make up my mind that, under all or any circumstances, the Court is bound to make a foreigner give security for costs if he brings an action in this country. The rule can hardly go that length; but if the matter is discretionary, the discretion, unless there is something very exceptional, is exercised only in one way.

The Divisional Court exercised their discretion, as I understand their judgment, upon the ground that, in their view, the plea, as pleaded, shewed no defence at all to the action. When we look at the plea, I think that was a mistake, and that the plea, as pleaded, does shew a defence, and, if it is proved, shews a good defence. Therefore, they have exercised their discretion on a wrong ground, and I think we must reverse the decision of the Divisional Court, and restore that of Grantham, J.

LOPES, L.J. In the case of *In re Percy and Kelly Nickel, Cobalt, and Chrome Iron Mining Co.* (4), the late Master of the Rolls, Sir George Jessel, and in the case of *Pray* v. *Edie* (5) Buller, J., held that the principle is well established that where a person is instituting legal proceedings in this country, being resident abroad, so that no adverse order could be effectually made against him if unsuccessful, he is, by the rules of the Court,

(1) 13 M. & W. 628.
(2) 5 P. D. 28.
(3) Law Rep. 6 Q. B. 139.
(4) 2 Ch. D. 531.
(5) 1 T. R. 267.

compelled to give security for costs. Speaking for myself, I certainly have always understood that to be, I may say, the inflexible rule of the Court; and I have always understood that no difference existed between an action on a foreign judgment and other actions.

The Divisional Court reversed the decision of Grantham, J., who ordered that the amount of security should be increased by 80*l.*; and they seem to have reversed it on different grounds. Mathew, J., seems to have thought that the order ought to be reversed, and the security left unaltered, because there was no substantial defence, or, I might almost say, no defence at all to this action. But we have carefully examined the plea, and now it is admitted, and it cannot in point of fact be disputed that, if that plea is made out, it will be, according to the authorities, a good answer to the action; and I think that must have been the view this Court entertained when the appeal came before it under Order XIV. On that occasion an application was made under Order XIV. for final judgment. The master refused it, and gave unconditional leave to defend; the judge did the same; the Divisional Court did the same; and this Court affirmed those respective decisions; and I take it we must have held that this plea (it was not in the shape of a plea then, but the effect of the plea was embodied in an affidavit) afforded a good answer to this action, if it was made out. I think, therefore, the ground upon which Mathew, J., proceeded was erroneous.

Collins, J., seems to have proceeded on another ground. He seems to have thought that there was a distinction to be drawn between an action brought on a foreign judgment and an ordinary action—for debt, I will say; and he seems to have put it on this ground: that there having been a decision by the foreign Court in favour of the plaintiff, there was a strong primâ facie case in his favour, and that, therefore, the ordinary rule ought not to apply. But, as I have already said, as far as I understand, there is no difference between an action on a foreign judgment and any other action. I think, therefore, the decision of the Divisional Court was wrong, and that the order made in chambers ought to be restored.

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DAVEY, L.J. I am of the same opinion. It was admitted that there is no authority to be found, either in the reports or in any text-book, for the refusal by the Court of an order for security for costs by a person resident abroad, suing in these Courts, except in the well-known exceptions of either cross-actions, or of an action against a defendant who has money of the plaintiff's in his hands, so that he can repay himself if necessary, or (it may be) if the plaintiff has substantial property within the jurisdiction. I should be surprised if there had been any authority, because, in my opinion, it is well established the other way, adopting as I do the language which has been quoted from the judgment of the late Master of the Rolls.

I only desire to add, with regard to the grounds stated by Mathew, J., that in my opinion, the Court cannot, upon an application for security for costs to be given by a plaintiff, go into the merits of the action. It appears to me that it would be highly inconvenient to do so, and as the reason for giving security for costs is not dependent on the merits of the action, I do not see why the merits of the action should be looked into at all. If the defendant has no defence, or if it is a frivolous defence, and a mere attempt to try the action over again, there are appropriate means for setting aside and removing from the files of the Court a statement of defence which affords no real ground of defence, but which is frivolous and vexatious.

With regard to the grounds stated by Collins, J., I can only say that I am not aware of any authority, nor has any been cited to us, to shew that, where security for costs is sought from a plaintiff resident abroad, there is any difference between an action brought on a foreign judgment and an action brought in respect of any ordinary contract, or for any other cause.

Appeal allowed.

Solicitors for plaintiff: *Nokes & Stammers.*
Solicitors for defendant: *Tatham & Lousada.*

A. M.

[IN THE COURT OF APPEAL.]

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March 19.

JACOBS *v.* CRUSHA AND OTHERS.

Practice—Suing in formâ pauperis—Notice of Motion by Plaintiff—Signature of Solicitor—Plaintiff in Default seeking Indulgence—Power to impose Terms as to Payment of Costs—Order XVI., *r.* 29.

A person admitted to sue in formâ pauperis to whom no solicitor has been assigned is entitled to move the Court without the notice of motion being signed by a solicitor.

Where a person admitted to sue in formâ pauperis is in default, and asks for indulgence, he may be required, as a condition of such indulgence being granted, to pay the costs incurred by the other party by reason of such default.

APPEAL from an order of the Divisional Court dismissing an appeal from an order directing that the action should be reinstated upon payment of costs. The plaintiff sued in formâ pauperis, but he did not apply to have any solicitor assigned to him. The action came on for trial before Charles, J. The defendants appeared, but the plaintiff did not appear, and the case was struck out. Subsequently the plaintiff applied to Charles, J., to have the case reinstated, and an order was made that it should be reinstated on payment of 5*l.* to the defendants in respect of their costs. The plaintiff did not pay the money, but moved the Divisional Court to set aside so much of the order as made it a condition that he should pay costs.

The Court (Cave and Wright, JJ.) dismissed the application on the ground that the notice of motion ought, under Order XVI., r. 29, to have been signed by a solicitor. (1)

The plaintiff appealed.

The plaintiff in person. The ground on which the Divisional Court refused to hear the application was wrong, for Order XVI., r. 29, only applies where a solicitor is assigned, and in the case

(1) Order XVI., r. 29: "No notice of motion shall be served or summons issued, and no petition shall be presented, on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor."

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of a person suing in formâ pauperis there is no power to impose any terms involving payment by him of costs.

Reginald Brown, for the defendant Crusha. The case of *Tucker* v. *Collinson* (1) was not called to the attention of the Divisional Court. From that case it would appear that a person who has been admitted to sue as a pauper, but to whom no counsel has been assigned, is entitled to be heard in person, but it does not follow that he can make such a motion as the present without the notice being signed by a solicitor. At any rate the order on the plaintiff to pay the costs thrown away by his default was authorized. Such an order might have been made by the express terms of the Rules of Hilary Term, 1853, r. 122, and by the former rules in Chancery, and the power still exists. That it used to be frequently exercised is clear from Viner's Abridgment, tit. Pauper, c. 3, 4, 5, and *Foster* v. *Bank of England*. (2)

A. Powell, for other defendants.

LOPES, L.J. The plaintiff brought an action against the defendants, and obtained the order necessary for him to sue in formâ pauperis, and might have had a solicitor assigned to him. He did not obtain an order to that effect, and the case came on for trial before Charles, J. The defendants appeared, and were ready to go on with the case, but the plaintiff was not present and the case was struck out. The plaintiff says, and no doubt truly, that he was ill and could not appear, and he subsequently applied to have the case reinstated. Charles, J., consented to this course being taken, but imposed the term that 5*l.* should be paid to the defendants to cover costs thrown away. The plaintiff did not pay this sum, but appealed to the Divisional Court, who refused his application on the ground, as I gather, that the case came within Order XVI., r. 29, and that a notice of motion on behalf of the plaintiff suing as a pauper could not be served unless it was signed by his solicitor. The plaintiff had no solicitor, and consequently no document signed by his solicitor, and the Divisional Court thought that he was precluded by the rule from making the motion. The case of *Tucker* v. *Collinson* (1) does not appear to have been brought to the attention of the

(1) 16 Q. B. D. 562. (2) 2 D. & L. 790.

Divisional Court. I find the effect of that case is that the rule was held to apply only when a solicitor has been assigned to the pauper, and not to the case where no solicitor has been assigned. This view is confirmed when the rule is looked at by the expression "his solicitor," which is not applicable where no solicitor has been assigned. In view of this decision it seems to me that the Divisional Court were wrong in precluding the plaintiff from making the application. The plaintiff takes another point, which is, that Charles, J., had no jurisdiction to impose the term as to the payment of 5*l.* as a condition for the restoration of the case. The authorities seem to me to dispose of this contention. I think it is only necessary to refer to one case, that of a pauper desiring to amend his pleadings: *Foster* v. *Bank of England* (1), where the Court of Queen's Bench said that they had no doubt that a pauper plaintiff is not entitled, as of right, to an amendment, without paying the costs attendant upon it. The principle of the decision I understand to be that when a pauper suitor asks an indulgence, there is authority to impose terms on him, and on consideration it seems to me to be reasonable enough that when a pauper makes default, if he wishes to escape from the effects of his default, it is fair to make him recoup the other side the expense caused by the action of the person asking an indulgence.

I think, therefore, that Charles, J., had jurisdiction to impose terms; and if he had, I do not think this is a case in which it would be proper to interfere with the discretion which he has exercised. Davey, L.J., agrees in the views I have stated, and the judgment of this Court must be that the appeal is dismissed.

Appeal dismissed.

The plaintiff in person.

Solicitors for defendants: *Avery & Co.*

(1) 2 D. & L. 790.

A. M.

1894
April 16

REID v. RIGBY & CO.

Principal and Agent—Liability of Principal—Unauthorized Borrowing by Agent—Money applied for Benefit of Principal—Claim by Lender for Money received—Cheque signed by Procuration—Limited Authority to sign—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 25.

The defendants' manager, who had authority to draw on the defendants' banking account for the purposes of their business, but had no authority to overdraw the account, or to borrow money on behalf of the defendants, borrowed 20*l.* from the plaintiff, stating that he wanted the money to pay the wages of the defendants' workmen, and gave as security a cheque signed in his own name by procuration for the defendants. The manager had overdrawn the defendants' banking account, and he borrowed the money for his own purposes, to replace money of the defendants which he had abstracted, but he paid the money in to the defendants' account at their bank, and used it to pay the wages of the defendants' workmen.

In an action on the cheque, and to recover the amount as money received to the use of the plaintiff:—

Held, first, that as, by virtue of s. 25 of the Bills of Exchange Act, 1882, the plaintiff must be taken to have had notice that the agent had but a limited authority to sign, and the defendants could only be bound if the agent acted within the limits of his authority, the claim on the cheque must fail:

Held, secondly, that, as the money had found its way into the defendants' possession, and had been employed for their benefit, it was money received by them to the use of the plaintiff, and, although the defendants had not been aware that their manager had borrowed the money, the plaintiff was entitled to recover.

Marsh v. *Keating* (1 Bing. N. C. 198) followed.

Appeal by the plaintiff from the decision of the judge of the Westminster County Court, in favour of the defendants, in an action brought by the plaintiff, first, to recover 20*l.* on a cheque, and, secondly, to recover the same sum as money received by the defendants to the use of the plaintiff.

The cheque in question was signed "Rigby & Co. per procuration of J. Allport, manager," and was drawn on May 21, 1892. The claim was made after Allport's death. It was found by the county court judge that Allport had been the manager of the defendants' firm, and had authority to draw on their banking account for the purposes of their business, but had no authority to overdraw their account, which he had overdrawn, or to borrow money on their behalf. It was also found that

Allport had borrowed this sum of 20*l.* for his own purposes, in order to replace money of the defendants which he himself had abstracted. The evidence shewed that Allport had obtained the cheque from the plaintiff by a statement that he was short of money, and wanted the money to pay the wages of the defendants' workmen, and it was shewn that he had paid the money into the defendants' account at their bank, and had used it to pay the wages of their workmen.

Le Riche, for the plaintiff, in support of the appeal. As to the claim on the cheque, Allport had authority to draw cheques. As to the second point, money obtained by the fraud of an agent, which finds its way into the possession of that agent's principal is money received by the principal to the use of the person from whom it was obtained, and can be recovered as such, although the principal was innocent and ignorant of the fraud. That this is so is established by the cases of *Marsh* v. *Keating* (1) and *Calland* v. *Loyd* (2), for it is clear under such circumstances that the money can be followed: *In re Hallett's Estate, Knatchbull* v. *Hallett* (3); *Collins* v. *Stimson.* (4) So far as the claim for money received is concerned, the plaintiff had no notice of any limitation of Allport's authority. [He also cited *Barwick* v. *English Joint Stock Bank.* (5)

Herbert Smith, for the defendants. By the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25, "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority." That is fatal to the claim on the cheque. As to the claim for money received, the findings in the Court below dispose of the plaintiff's claim. In *Marsh* v. *Keating* (6), Park, J., in delivering the opinion of the judges in the House of Lords, said: "But it is objected thirdly that the proceeds of the sale of the stock never came into the hands of the defendants, so as to be money received by them to the use

(1) 1 Bing. N. C. 198.
(2) 6 M. & W. 26.
(3) 13 Ch. D. 696.
(4) 11 Q. B. D. 142.
(5) Law Rep. 2 Ex. 259.
(6) 1 Bing. N. C. at p. 219.

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of the plaintiff; and the consideration of this objection involves two questions:—First, did the money actually come into the possession of the defendants? Secondly, if it ever was in their possession, had the defendants the means of knowledge, whilst it remained in their hands, that it was the money of the plaintiff, and not the money of Fauntleroy?" Here the evidence does not shew that the money came into the hands of the defendants; but, if it did, there is no evidence that the defendants had the means of knowing of the plaintiff's claim while the money was in their hands. In *Marsh* v. *Keating* (1), Fauntleroy had the authority of a partner, and in the other cases the money was ear-marked.

Le Riche, was not heard in reply.

CHARLES, J. This action is brought in a twofold form: first, on a cheque given by Allport, the defendants' manager, to Reid, the plaintiff, as security for a sum of 20*l.* borrowed by Allport from the plaintiff in the name of the defendants; and, secondly, for the same sum of 20*l.* as money received to the use of the plaintiff. As to the claim on the cheque, it appears that Allport was the general manager of the defendants, and as such had express authority to draw on their banking account for the purposes of their business, and he had also a general authority to pay money in to the bank to their account. No question arose as to any special authority. Allport told the plaintiff that he was short of cash and wanted money to pay the workmen's wages, and he gave a cheque signed per procuration for Rigby & Co., the defendants. On the face of it that cheque conveyed an intimation to the plaintiff that Allport, as the agent of the defendants, had only a limited authority to sign. This is expressly provided by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25. As a matter of fact, the defendants' banking account was at that time overdrawn, and the county court judge has found that Allport had no authority to overdraw that account; and he has also found—and we must accept his finding on this point as correct—that Allport had no authority to borrow money for the defendants. But he did

(1) 1 Bing. N. C. 198.

borrow money, and having got the money he paid it in to the defendants' banking account. I say that this is so because the cash-book, which I have carefully examined, leaves no doubt in my mind that the 20*l.* found its way into the defendants' banking account. It appears that a sum of 38*l.* 2*s.* was paid in, which enabled Allport to draw a cheque for 30*l.* in order to discharge the workmen's wages. Therefore Allport paid the money for the purpose of the business. In my opinion, the true inference is that the money which was borrowed for wages was paid in to the defendants' banking account, and was applied in payment of wages. The question is whether the plaintiff can recover that money from the defendants. It is contended on behalf of the defendants that he cannot, on the findings of the county court judge to which I have referred, and also on a further finding, that Allport borrowed the money for his own purposes, in order to replace money belonging to the defendants which he had abstracted. I was at first somewhat embarrassed by that finding; but on consideration I have come to the conclusion that it does not affect the legal position of the parties. Allport has paid the money in to the defendants' banking account; and either it is there now or it has been paid in wages to the defendants' workmen. The latter, I think, is the true inference; but in either case I think the result is the same. Suppose that Allport had paid the money direct to the workmen, and had asked the defendants to repay him, could the defendants have refused? It seems to me, that if the wages had been so paid, then, when the defendants had discovered the fact of payment, they must have either repudiated such payment or adopted it. By accepting the benefit of the payment they would adopt it. It comes to this, that either the workmen have been paid or they have not. If they have been paid, the money so paid was in contemplation of law money received by the defendants to the use of the plaintiff; for either they have ratified the payment, or, if the money is still in their bank, it is the money of the plaintiff. I am of opinion that the decision in *Marsh* v. *Keating* (1) supports this view. In that case the money sought to be recovered was the proceeds

(1) 1 Bing. N. C. 198.

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of the fraud of Fauntleroy. The defendants, who had been Fauntleroy's partners, knew nothing of the fraud; but the judges who advised the House of Lords expressed a unanimous opinion that it must be treated as money received by the defendants to the use of the plaintiff, because it came into the possession of the defendants. The same view applies to the present case. Further than this, the defendants have since had an opportunity of finding out that the money had been paid in to their account. For these reasons I am of opinion that this sum of 20*l.* was money received by the defendants to the use of the plaintiff. I will not say what the result might have been if the money had been paid in to the bank under some binding contract between Allport and the defendants. However it was paid in, it has found its way into the possession of the defendants, and therefore it was money received to the use of the plaintiff, which he is entitled to recover, and the appeal must be allowed.

COLLINS, J. I am of the same opinion. I need hardly say that I should not differ from the view taken by the learned county court judge without full consideration; but in this case I am satisfied that the judgment is wrong. The money in question was obtained from the plaintiff on the security of a cheque signed by Allport per procuration for the defendants, Rigby & Co. By the terms of s. 25 of the Bills of Exchange Act, 1882, it was apparent on the face of the cheque that the authority of the person signing the cheque was limited. I can entertain no doubt, on examination of the account, that this sum of 20*l.* found its way to the credit of the defendants' account at the bank. The question for our determination is whether the plaintiff can maintain an action to recover that sum. If, instead of giving a cheque, Allport had asked the plaintiff to pay the workmen, and the plaintiff had done so, could not the plaintiff have maintained an action against the defendants to recover what he had paid? I am of opinion that he could; for what he did would have been a payment of the defendants' debt. On that state of facts, therefore, the plaintiff would be entitled to recover. Then does it make any difference that the money went into the bank? I

think not; for the effect of the transaction could only be rendered different if the money were paid in by virtue of some contract which was binding as between Allport and the defendants; but there was no such contract, and there had been no change of position before the defendants knew the facts. The question is whether, now that they have found out Allport's defalcations, the defendants can keep the plaintiff's money. I am of opinion that the cases which have been referred to in argument, *Marsh* v. *Keating* (1) and *Calland* v. *Loyd* (2), go the full length of shewing that they cannot, and, in my opinion, the present is an à fortiori case.

Appeal allowed. Leave to appeal granted.

Solicitor for plaintiff: *C. T. Foster.*
Solicitors for defendants: *Eisdell & Thompson.*

P. B. H.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

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Dec. 12, 20, 21.

THE DARLASTON LOCAL BOARD *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway and Canal Commission—"Reasonable facilities for the receiving and forwarding and delivering of traffic"—Closing of station for passenger traffic, at which there is a substantial amount of such traffic, without providing an equivalent—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2.

A railway company who close a station for passenger traffic, at which there is a substantial amount of such traffic, without providing an equivalent, commit a breach of their obligation to "afford all reasonable facilities for the receiving and forwarding and delivering of traffic" pursuant to s. 2 of the Railway and Canal Traffic Act, 1854.

APPLICATION by the local board for the district of Darlaston, in the county of Stafford, under s. 2 of the Railway and Canal Traffic Act, 1854, for an order requiring the London and North Western Railway Company to "afford reasonable facilities for the receiving and forwarding and delivering" of passenger traffic on their branch line between Wednesbury and James

(1) 1 Bing. N. C. 198. (2) 6 M. & W. 26.

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Bridge stations, and to re-open Darlaston station for this purpose.

The answer of the respondents was, in substance, as follows:—

The branch line referred to is described in the South Staffordshire Railway Act, 1855 (18 & 19 Vict. c. clxxv.), by which it was authorized, as follows: "A railway commencing by a junction with the South Staffordshire Railway at or near the Wednesbury station of that railway in the parish of Wednesbury, and terminating by a junction with the London and North Western Railway in the parish of Darlaston near the Darlaston passenger station." Such Darlaston passenger station is now known as James Bridge station.

The Darlaston passenger station at James Bridge was constructed to afford, and did and does afford, in conjunction with Wednesbury station, all the accommodation that can reasonably be required by passengers to and from the district of the applicants who are desirous of travelling by the respondents' railway. The erection of an additional station at Darlaston was not required by the Act, nor are the respondents under any obligation to erect or maintain such station; but, without the station, a passenger service upon the branch line between Wednesbury and James Bridge stations would be of no advantage to the applicants.

The distance from the market place of Darlaston to James Bridge station by road is less than one mile, and that to Wednesbury station less than one mile and a half.

The undertaking of the South Staffordshire Railway Company including the branch line was leased to the respondents in 1861, and subsequently became vested in them. The line was opened in 1863, and worked by the respondents, who erected an additional station at Darlaston, and continued to use such station and the railway for passenger traffic to and from such station from and to James Bridge station and from and to Wednesbury station by a shuttle service, until, owing to the construction of steam tramways between Darlaston and those stations, the railway ceased to be used or required for the purpose of passenger traffic, except to an insignificant extent.

A steam tramway between Darlaston and Wednesbury was

opened in 1883, and one between Darlaston and James Bridge in 1884. A very efficient service is conducted upon these tramways. They run through the populous parts of Darlaston, and so much of the passenger traffic was diverted by them from the railway, that it was found necessary to considerably reduce the number of trains upon the line. A train service was, however, continued until 1887.

The expense to the respondents of maintaining a passenger train service, and the staff which an additional passenger station at Darlaston involved was, and still would be, so disproportionate to the receipts from the traffic and to the public accommodation that would be afforded, that it would be unreasonable to require the respondents to maintain such a service.

Since the railway was closed for passenger traffic, the respondents have, in the bonâ fide exercise of their discretion in the management of the line, removed the additional station which was erected upon the railway at Darlaston; and it would be necessary to re-erect this station, and to incur other expenses, at great cost to the respondents, in order to recommence a passenger train service upon the railway; and the respondents submit that the Court has no jurisdiction to compel the respondents to re-erect the station, either by a direct order, or indirectly by an order which would involve its re-erection, and that such an order would under the circumstances be unreasonable.

It appeared that the population of Darlaston and the neighbourhood was about 20,000.

Witnesses from the district were examined in support of the application. They stated that the closing of the station had placed the inhabitants at a disadvantage, especially as regards communication with Birmingham, Wolverhampton, and Walsall, and that the decline of the traffic was due to the small number of trains run. Witnesses from the district, who were examined on behalf of the respondents, denied that there would be any public advantage in reopening the station. Their general manager gave evidence in support of their answer, and produced tables shewing the earnings of the branch line from passenger traffic from January, 1877, to October, 1887, the cost of working

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the line during that time, and the consequent loss. (1) He stated that between 1881 and 1883 the service of trains had been increased, and that the respondents had considered a scheme for a curve at Wednesbury connecting the branch line with the main line, but had found the scheme impracticable.

(1) The following is a summary of the tables produced :—

	Darlaston and James Bridge.		Darlaston and stations beyond James Bridge.		Darlaston and Wednesbury.		Darlaston and stations beyond Wednesbury.	
	Number of Passengers.	Receipts.	Number of Passengers.	Receipts.	Number of Passengers.	Receipts.	Number of Passengers.	Receipts.
		£		£		£		£
1877	1,311	10	56,824	198	24,795	216	20,911	141
1878	1,024	8	51,328	178	21,551	187	18,888	128
1879	811	6	43,127	149	18,634	162	15,870	108
1880	994	8	44,052	153	17,633	152	16,211	110
1881	1,392	11	42,692	149	15,779	135	15,710	106
1882	1,948	16	48,644	169	16,570	140	17,901	121
1883	2,182	18	50,006	174	11,177	93	18,402	124
1884	582	5	16,589	57	1,724	11	6,105	42
1885	277	2	9,828	35	1,329	8	3,617	24
1886	411	3	7,604	27	1,231	8	2,798	19
1887	361	2	5,904	20	857	6	2,173	15

	Wednesbury and James Bridge.		Wednesbury and stations beyond James Bridge, including Wednesbury from and to stations beyond James Bridge, and James Bridge from and to stations beyond Wednesbury.					
	Number of Passengers.	Receipts.	Number of Passengers.	Receipts.	Total number of Passengers.	Total receipts.	Total expenses.	Loss.
		£		£		£	£	£
1877	1,588	21	3,258	20	108,687	606	1,922	1,316
1878	1,057	14	3,652	23	97,500	538	1,754	1,216
1879	1,101	14	3,232	20	82,775	459	2,037	1,579
1880	1,229	16	2,890	18	83,009	457	1,769	1,312
1881	1,408	18	3,619	24	80,600	443	2,131	1,688
1882	1,641	21	5,373	33	92,077	500	1,870	1,370
1883	1,108	14	6,004	37	88,879	460	2.323	1,863
1884	471	6	2,982	19	28,453	140	1,941	1,801
1885	332	5	2,496	17	17,879	91	1,772	1,681
1886	309	4	2,205	15	14,558	76	1,447	1,371
1887	239	3	1,850	14	11,384	60	1,159	1,099

Balfour Browne, Q.C. (with him, *E. T. Slater*), for the applicants. An order should be made. The case is governed by the decision of the Court in the case of *The Winsford Local Board* v. *The Cheshire Lines Committee.* (1) That case decides that the closing of part of a line for passenger traffic is a breach of the obligation of the railway company to afford "reasonable facilities" pursuant to s. 2 of the Railway and Canal Traffic Act, 1854. According to the definition of "railway" in s. 1 a station is part of the railway to which it belongs. If there had been practically no passenger traffic at Darlaston station, when the respondents pulled it down, their act might not have been illegal. But the evidence shews that at this time there was still a considerable amount of passenger traffic at the station; and the use of the station was, therefore, "a reasonable facility" which the respondents were bound to provide.

Pope, Q.C., and *Sir R. Webster, Q.C.* (with them *Moon*), for the respondents. The Court has no jurisdiction to make the order. The case of *The South Eastern Ry. Co.* v. *The Railway Commissioners and The Corporation of Hastings* (2) in the Court of Appeal decides that the Court cannot order the opening of a new station. By the definition only stations "used for the purposes of public traffic" are part of the railway. Darlaston station is not now such a station as regards passenger traffic. The applicants might, perhaps, have been entitled to an order before the station was closed; but, as it is closed, their right is gone. In his judgment in that case Lord Selborne says that "there is no obligation on a company to establish a station at any particular place unless they think fit," and that it is only when they "actually use a station for public traffic" that they are bound to afford "reasonable facilities" in respect of it; and Brett, L.J., in his judgment says that "an order would be beyond the jurisdiction of the Court, if it could not be obeyed without what every ordinary person would reasonably say was the making a new station, the distinction being between the improvement of an existing station, and the making of a substantially different station." (3)

(1) 24 Q. B. D. 456. (2) 6 Q. B. D. 586.
(3) 6 Q. B. D. 586, at pp. 592, 602.

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WILLS, J. This case raises the important question whether or not this Court has jurisdiction to make an order in effect requiring a railway company to reopen a station which they have closed. The order applied for is one requiring the London and North Western Railway Company to give "reasonable facilities" for passenger traffic, in accordance with the obligation imposed upon them by the 2nd section of the Railway and Canal Traffic Act, 1854, on the short branch of their line which runs from Wednesbury station to James Bridge station. They have ceased since 1887 to run passenger trains on this part of their line, and they have closed Darlaston station, which lies between these stations.

In the case of *The Winsford Local Board* v. *The Cheshire Lines Committee* (1) this Court decided that the discontinuance by a railway company of passenger traffic on a portion of their line was a breach of the obligation. I have read with care the judgment which I delivered in that case, and the authorities upon which it is based, and I am convinced that the decision is correct. We must, therefore, now hold that, by ceasing to run passenger trains on this part of their line, the respondents committed a breach of the obligation. But I apprehend that the effect of an order, with which the respondents could comply by running trains between these stations, which did not stop at Darlaston, would be to inflict loss on them, without in any way benefiting the applicants. The question, therefore, which we have to decide is, whether we have power to declare that the closing of Darlaston station in 1887 was itself a breach of the obligation.

We sit here, not to enforce a pedantic and useless compliance with the letter of the section, but to remedy practical grievances. If, therefore, we found that, at the time when the respondents closed this station, there was no passenger traffic worthy of consideration which required to be accommodated at it, we should refuse to make an order on the ground that, according to the statutory definition, a railway station is part of the line of railway to which it belongs, and that the respondents had, therefore, no more right to close this station than they had to close any other part of their line. But we are satisfied that, at the time

(1) 24 Q. B. D. 456.

when the station was closed, there was an amount of passenger traffic at it which, though not large, was still substantial. There had been a diminution since 1883—a diminution much less in the through traffic than in the local traffic, which was probably better served by the tramways. But the through traffic has also to be considered, and it had clearly fallen off much less than the local traffic. It is also plain that the reduction in the number of trains would account for a great part of this falling off; for the traffic was of a kind that would not wait, as passengers could not be expected to concentrate their attention on catching a train at this or that particular time. We entertain, then, no doubt that, at the time when this station was closed, it still accommodated a substantial amount of passenger traffic for which a station was necessary. When, then, this condition is fulfilled, when there is at a station a substantial amount of passenger traffic such as to require a station, I think that a railway company which closes that station without providing an equivalent does commit a breach of the obligation to "afford reasonable facilities." I desire to insist upon these qualifying words, "without providing an equivalent." We have no desire to interfere in any arbitrary or inconvenient way with the discretion of railway companies, or to propound any such maxim as "once a station always a station." We do not suggest that railway companies are not perfectly at liberty, if the needs of traffic and the exigencies of their business justify such a step, to alter the position of a station, or, within any reasonable limits, to consult their own convenience in such matters as well as that of the public. But I think that we are justified in laying down the general proposition, that, where a station exists, and there is at that station a substantial amount of passenger traffic, for the railway company to close that station without providing an equivalent is a breach of the obligation to give "reasonable facilities" under the section, the word "railway" in which is defined by words of extension as including "every station of or belonging to such company used for the purposes of public traffic."

Sir Richard Webster, in his argument for the respondents relied on the words "used for the purposes of public traffic." He contended that the meaning of "used" is "actually in use"

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—that is, actually in use at the time of the application to this Court. If this be so, it follows that a railway company can close its largest station, and say to the neighbourhood, "This station is closed. We will take no more traffic from it or to it; and, if you go before the Commission, you will be too late. The station is no longer used for the purposes of public traffic, and the Commission has, therefore, no jurisdiction." I cannot think that this result was intended by the legislature. I have felt some difficulty about the matter, owing to the decision of the Court of Appeal in the case of *The South-Eastern Railway Company* v. *The Railway Commissioners and The Corporation of Hastings* (1); but I think that the effect of the section is that, if the use of an existing station is a "reasonable facility," the company is not at liberty to close the station without providing an equivalent.

In that case the Court of Appeal certainly decided that this Court has not jurisdiction to make an order for "reasonable facilities," which can only be complied with by the opening of a new station. I confess that, but for the decision, I should have thought that much might have been urged against this view of the effect of the section. It seems strange that, if a railway company, whose line, when first constructed, ran through an uninhabited district, did not, when the district afterwards became thickly populated and a flourishing centre of trade, build a station there, they would commit no breach of their obligation to afford "reasonable facilities" of which this Court could take cognizance. Such a case might not be very likely to arise, because it would generally be profitable to the railway company to possess a station in a district which had thus become important; but it must be remembered that railway companies often have motives, which do not appear on the surface, for fostering one district or one trade at the expense of another; and in considering the meaning of a statute it is frequently necessary to put an extreme case. It follows, I think, certainly, from this decision, that a railway company could act in this way without committing a breach of the statutory obligation; and I have felt some difficulty as to how in strict logic to reconcile

(1) 6 Q. B. D. 586.

this state of the law with the proposition which I am laying down. I have come, however, to the conclusion that there is no real inconsistency. The proposition that a railway company is at liberty to close a station for which there is an existing public need, seems to me far wider than the decision of the Court of Appeal that this Court cannot make an order either directly or indirectly requiring a railway company to open a new station. There are, it is true, expressions in the judgments which seem to favour the view, that this Court cannot require a station which has been closed to be reopened, any more than it can require a new station to be constructed; but all expressions in judgments are to be interpreted with reference to the specific matter before the Court, and I do not think that the case, when fairly considered, contains anything out of harmony with the proposition which I have endeavoured to formulate. I trust that I have done so in such a way as to enable the respondents, should they think fit, to submit this important question to the Court of Appeal.

I have only to add that the service which ought, we think, to be established, is a service reasonable not only from the point of view of the applicants, but from that of the respondents. We give no countenance to the notion that a place like Darlaston, which makes only a very moderate contribution to the respondents' funds, can expect to be treated as if it were the most important place on their line. It is but too plain that the line must be worked at a loss, and we regret to impose this burden upon the respondents. They endeavoured in good faith for several years to provide an efficient passenger service, and it was only when they found that they were incurring a heavy loss that they closed the line for passenger traffic. We think that in doing so they acted illegally; but I do not wish to encourage a fresh application hereafter, on the ground that the extravagant expectations of the district have not been realized. A general order will be made. The advantage of that form of order is that it throws the responsibility of devising the proper means for carrying out the decision of the Court upon the persons who are best qualified to devise them. As the applicants are in the right, we think that they ought to have their costs.

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SIR F. PEEL and VISCOUNT COBHAM concurred.

The order recited that the applicants had complained that the respondents had ceased to use the railway between Wednesbury and James Bridge for the conveyance of passengers, and had closed the station on such railway at Darlaston previously used for such traffic, and that such complaint had been proved to be true, and required the respondents, their agents and servants, to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic upon and from the said railway.

Solicitors for the applicants: *Ullithorne, Currey, & Villiers, for J. Corbett, Darlaston.*

Solicitor for the respondents: *C. H. Mason.*

H. D. W.

C. A.

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April 5.

[IN THE COURT OF APPEAL.]

HEBDITCH *v.* MACILWAINE AND OTHERS.

Defamation—Libel—Privileged Occasion—Absence of Interest or Duty in Person to whom defamatory Statement is made—Belief of Defendant in existence of such Interest or Duty.

In order that the occasion upon which a defamatory statement is made may be privileged, it is necessary that the person to whom such statement is made, as well as the person making it, should have an interest or duty in respect of the subject-matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty.

Tompson v. *Dashwood* (11 Q. B. D. 43) disapproved of.

APPLICATION by defendants for judgment or new trial.

The action, which was for libel, was tried before Vaughan Williams, J., with a jury. The defendants pleaded a justification and privilege.

It appeared that the plaintiff had been elected to the office of guardian of the poor for the parish of South Petherton. The defendants, who were ratepayers of the parish and entitled to vote at the election, signed and sent to the board of guardians a letter complaining of certain irregularities which they alleged to have occurred at the election, and suggesting that the matter ought to be inquired into. The first part of this letter alleged

in substance that voting papers had been tampered with, that the voting paper of a voter had been filled up by an employé of the plaintiff in the absence of the voter, and his wife had been induced to put her mark to the paper, and that other similar cases had occurred; the latter part of the letter alleged in substance that electors had been treated with drink. The plaintiff alleged that the effect of the letter was to impute that he had himself participated in the malpractices therein mentioned. The judge left to the jury the following questions: 1. Whether the letter was libellous with regard to the plaintiff; 2. Whether the plea of justification was proved; 3. Whether the defendants honestly believed it to be their duty to make each and all of the communications contained in the letter to the board of guardians, and did so acting under a sense of that duty; 4. Whether the defendants honestly and reasonably believed that the board of guardians were the proper authority to whom to apply in respect of each and all of the matters mentioned in the letter. The judge reserved any question of actual malice until these questions had been answered. The jury found that the letter was libellous with regard to the plaintiff, and that the plea of justification was not proved. In answer to the third question they found that the defendants acted partly under a sense of duty, and partly not. In answer to the fourth question, they found that the defendants did honestly and reasonably believe that the board of guardians were the proper authority to whom to apply. The judge, thinking the effect of these answers ambiguous, asked the jury the following further questions: 1. Whether the defendants wrote the first part of the letter under a sense of duty, and believing the board of guardians to be the proper authority to whom to apply; 2. a similar question with regard to the latter part of the letter. The jury answered the first of these questions in the affirmative, and the second in the negative.

The judge thereupon held that the occasion was not wholly privileged, and, therefore, the plaintiff was entitled to damages, the amount of which he asked the jury to assess. The jury assessed the damages at 10*l.*, for which sum the judge gave the plaintiff judgment.

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J. Alderson Foote, for the defendants. The judge, upon the finding of the jury that the defendants honestly and reasonably believed the board of guardians to be the proper authority to whom to apply, ought to have held the occasion to be privileged. That being so, in the absence of express malice, the defendants would be entitled to judgment. The jury, no doubt, found in the negative on the question whether the defendants acted under a sense of duty with regard to the latter part of the letter. But that question would only be material in dealing with the question of express malice. That question never arose, the judge ruling that the occasion was not privileged. There was no evidence in this case to go to the jury of actual malice.

The defendants as ratepayers had an interest in the matter to which the letter related. It may be admitted that the board of guardians could take no action in the matter brought before them by the defendants. They could not avoid the plaintiff's election. That could only be done by a petition under the Municipal Corporations Act, 1882, part IV., which is rendered applicable in the case of elections to the office of guardian by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 36. It is contended, however, that, where a person who has a grievance makes a complaint in respect thereof to a person or body, whose duty he honestly and reasonably believes it to be to inquire into and redress such grievance, the occasion is privileged. See per Fitzgerald, B., in the Irish case of *Waring* v. *M'Caldin*. (1) The ruling of Blackburn, J., in *Scarll* v. *Dixon* (2), is in favour of the view that the fact that the complaint is by mistake made to the wrong person will not prevent the occasion from being privileged. In *Harrison* v. *Bush* (3) the Court no doubt declined to express any conclusive opinion on this point, but the language used by Lord Campbell, C.J., in delivering the judgment, seems in favour of the contention now put forward for the defendants. See also *Lake* v. *King* (4); *Rex* v. *Bayley* (5); *Fairman* v. *Ives* (6);

(1) Ir. Rep. 7 C. L. 282.
(2) 4 F. & F. 250.
(3) 5 E. & B. 344.
(4) 1 Wms. Saund. 131 (b).
(5) Cited in *Harrison* v. *Bush*, 5 E. & B. 355.
(6) 5 B. & A. 642.

McDougall v. *Claridge* (1); *Cleaver* v. *Sarraude* (2); *Rex* v. *Baillie.* (3)

[LORD ESHER, M.R., referred to the observations made by Cresswell, J., in *Pearson* v. *Lemaitre* (4), upon the cases of *McDougall* v. *Claridge* (1) and *Fairman* v. *Ives.* (5)]

In many of these cases the complaint was made to persons who really could not be said to have any duty to take action in the matter; and yet the occasion was held to be privileged. In *Harrison* v. *Bush* (6), the ground of the decision, no doubt, was that the complaint must be treated as having been in substance addressed to the Sovereign. But it is difficult to put the decisions and dicta in many of the previous cases on that ground; for instance, in *Fairman* v. *Ives* (5), the Secretary of State for War had nothing to do with making an officer in the army pay his debts, and could not be supposed to represent the Sovereign for that purpose. The case of *Tompson* v. *Dashwood* (7) is a distinct authority in the defendants' favour. In that case the defendant wrote a letter containing defamatory matter, intending to send it to a person, publication to whom would have been on a privileged occasion, and by mistake put the letter in the wrong envelope, and sent it to another person. It was held that the defendant was not liable to an action for libel.

Blake Odgers, Q.C., and *Clavell Salter*, for the plaintiff. To constitute a privileged occasion there must be an interest or duty in the person to whom the communication is made, as well as in the person making it. This clearly appears from the case of *Toogood* v. *Spyring* (8), and is laid down in terms in *Harrison* v. *Bush.* (6) There is no authority for the exception to this rule, which it is sought to make in favour of a person seeking redress, and by mistake applying to a person who has no duty or power in the matter. The cases on which reliance has been placed for the defendants are all explicable on the ground that, where the Sovereign or other official personage, who can redress a grievance,

(1) 1 Camp. 267.
(2) Cited in *McDougall* v. *Claridge*, 1 Camp. 268.
(3) 21 How. State Trials, 1.
(4) 5 M. & G. 700, at pp. 709, 710.
(5) 5 B. & A. 642.
(6) 5 E. & B. 344.
(7) 11 Q. B. D. 43.
(8) 1 C. M. & R. 181.

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may be approached through various channels, the fact that the communication may not be made through the most appropriate channel does not prevent the occasion from being privileged. *Tompson* v. *Dashwood* (1) is distinguishable, for there the defendant had no intention of writing to the person to whom the letter actually went. Moreover, that case was wrongly decided. [They also cited *Blagg* v. *Sturt* (2); *Stuart* v. *Bell.* (3)]

J. Alderson Foote, in reply.

LORD ESHER, M.R. In this case the plaintiff has brought an action against the defendants for writing and publishing a libel upon him, the defamatory matter complained of being that he had, when a candidate for the office of guardian of the poor, been guilty of treating. It must be borne in mind that the material part of the cause of action in libel is not the writing, but the publication of the libel. It was proved that the defendants had written and published to the board of guardians matter which the jury found to be libellous with regard to the plaintiff, and which was untrue. The defendants set up by way of defence that the occasion was privileged. It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of shewing actual malice is cast upon the plaintiff, but, unless the defendant does so, the plaintiff is not called upon to prove actual malice. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury, but, when the jury have found the facts, it is for the judge to say whether they constitute a privileged occasion.

What are the facts upon which the question, whether the occasion was privileged, depends in the present case? There had been an election to the office of guardian of the poor, and the plaintiff had been elected. The defendants were ratepayers, who had a right to vote at the election. After the election they wrote and sent the letter containing the matter complained of to the board of guardians. It seems clear that, when that board

(1) 11 Q. B. D. 43. (2) 10 Q. B. 899.
(3) [1891] 2 Q. B. 341.

had received the letter, they could do nothing in the matter. They could not set aside the election. Such being the facts of the case, what was the judge called upon to consider in dealing with the question whether the occasion was privileged? He had first to consider whether the defendants, who published the defamatory matter, had any interest or duty in connection with the subject which they thus brought before the board of guardians. I am not prepared to say that they had not an interest or duty. On the contrary, I am inclined to think that they had an interest in the matter. They were electors, and had an interest in having the office filled by a person properly elected. Then the position of the board of guardians, to whom the defamatory matter was published, had to be considered. They had no interest in the matter, as it seems to me, and, as I have already said, they had no duty or power to take any action upon the communication made to them. Under these circumstances I think it clear that the occasion was not privileged.

It was argued that, although the board of guardians had no power or duty or interest in the matter, nevertheless the occasion was privileged, because the defendants honestly and reasonably believed that the board had such a duty or power or interest, and were asking them for redress in the matter, which they believed they could give. Assuming that the defendants had such a belief, though I confess I cannot see how there could be any reason in such a belief, the argument in substance seems to come to this: that the belief of the defendants that the occasion was privileged makes it privileged. I cannot accept the proposition so put forward. I cannot see how the belief of the defendants, who have made a mistake, and have published a libel to persons who have no interest or duty or power in the matter, can affect the question. The belief of the defendants might have a bearing on the question of malice; if it be assumed that the occasion was privileged, the belief of the defendants might be strong to shew that the communication was privileged, as being made without malice, but I do not think it has anything to do with the question whether the occasion was privileged. Reliance was placed rather on authority than on principle in support of the contention for the defendants. If that contention had been

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decided to be correct by the Court of Appeal or any Court whose authority was binding on us, there would, of course, be no more to be said. But I do not think that the point has been decided in favour of the defendants by any such Court. I do not propose to go through all the cases which have been cited. We are sitting here as a Court of Appeal, and it does not seem to me to be necessary to examine minutely every case to which reference has been made. The first case that was relied on was the Irish case of *Waring* v. *M'Caldin* (1) before Fitzgerald, B. That learned judge's authority is entitled to great respect, but the question arises in my mind whether the words which have been cited from his judgment represent the real and deliberate judgment of the learned judge. It is to be observed that, immediately before he used them, he had enunciated the proposition of law with regard to what constitutes a privileged occasion as being that there must be a corresponding interest or duty in the person to whom the libellous communication is made. I cannot help thinking that it was by a momentary inadvertence that, after thus deliberately laying down the true proposition of law on the subject, he used in the next sentence, parenthetically, the words upon which reliance has been placed. If he really did intend to express an opinion that the law was as implied by those words, I must say that I cannot agree with him. The case of *Stuart* v. *Bell* (2) is binding upon us as being a decision of the Court of Appeal; but it seems to me that that case is, when it is looked into, a distinct authority against the proposition contended for by the defendants' counsel. Lindley, L.J., in giving judgment says, after commenting upon *Whiteley* v. *Adams* (3), and dealing with the question whether the defendant had an interest as distinguished from a moral or social duty to act as he did; "But the question still remains whether the defendant was not under a moral or social duty to make such communication. Both the defendant and Stanley say that the defendant acted under a sense of duty, but this, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. That question does not

(1) Ir. Rep. 7 C. L. 282. (2) [1891] 2 Q. B. 341.
(3) 15 C. B. (N.S.) 392, at p. 418.

depend on the defendant's belief, but on whether he was right or mistaken in that belief." That is a clear authority to the effect that the belief of the defendant that there was a duty to make the communication is irrelevant to the question whether the occasion is privileged. The case of *Harrison* v. *Bush* (1) was cited to us; but in that case Lord Campbell, C.J., said in the clearest way that the Court declined to express any opinion on the point now raised. The expressions used in a subsequent part of the judgment were relied upon as favouring the defendants' contention, but, when the Court distinctly say that they give no opinion on the point, much weight cannot be given to these expressions. The cases of *McDougall* v. *Claridge* (2) and *Fairman* v. *Ives* (3) were relied on as authorities for the defendants; but, when these cases were cited before the Court of Common Pleas in *Pearson* v. *Lemaitre* (4), Cresswell, J., suggested that the report of *Fairman* v. *Ives* (3) might not be quite accurate and that qualifying words must have been omitted; and he said in effect that the cases must have proceeded on the footing that the communication was made to a person having an interest or duty in the matter. Then there is the case of *Scarll* v. *Dixon.* (5) There, again, the report of the case is not very clear, and the ruling of the judge would seem to have proceeded on the view that the complaint was in substance made to the defendant's employers. The only case which really seems to me to be a strong authority in favour of the defendants' contention is the case of *Tompson* v. *Dashwood.* (6) There the judges distinguish between the writing and the publication of the libel, and speak of the writing as having been on a privileged occasion. I cannot follow their reasoning. The cause of action in libel is, as I said at the beginning of my judgment, not the writing but the publication of the libel; and the question is not whether the writing, but whether the publication is on a privileged occasion. The only way to deal with that case in my opinion is to say that we do not agree with it, and that it was wrongly decided. Therefore, in the present case, when it was proved to the judge that

(1) 5 E. & B. 344.
(2) 1 Camp. 267.
(3) 5 B. & A. 642.
(4) 5 M. & G. 700, at p. 709, 710.
(5) 4 F. & F. 250.
(6) 11 Q. B. D. 43.

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the libel was published by the defendants to the board of guardians, who had no interest in the matter nor any duty or power to deal with it, then, without more, he ought to have held that the occasion was not privileged, and there was no further question to try as to privilege. Therefore I think that the questions which he left to the jury with regard to the question of privilege were unnecessary and irrelevant, and consequently it is immaterial to consider whether they were right in form or not, or what the effect of the findings of the jury upon them may be. I am of opinion that on the undisputed facts the judge was bound to rule that the occasion was not privileged. For these reasons I think that this application must be dismissed.

A. L. SMITH, L.J. I also think that the verdict and judgment in this case must stand. The action was for libel. The plaintiff established that the defendants had published a libellous statement concerning him, and that such statement was untrue; for, though a justification was pleaded, it failed. The defendants thereupon set up, by way of defence, that the occasion was privileged. That raises the question, What constitutes a privileged occasion? The law on this subject was laid down by Parke, B., in delivering the judgment of the Court of Exchequer in *Toogood* v. *Spyring* (1), and by Lord Campbell, C.J., in delivering the judgment of the Court of Queen's Bench in *Harrison* v. *Bush.* (2) It was in the latter case expressed thus: "A communication made bonâ fide upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty"—which includes, I may add, a duty moral or social—"is privileged, if made to a person having a corresponding interest or duty, although it contains criminatory matter, which without this privilege would be slanderous and actionable." Therefore, in order that the occasion may be privileged, there must be an interest or duty in the person to whom the libel is published, corresponding with that of the person publishing it. It is not disputed here that, whatever interest the defendants might have, the board of guardians to whom the libel was published had no interest or duty or power in the matter. Under these circum-

(1) 1 C. M. & R. 181. (2) 5 E. & B. 344.

stances it appears to me that, upon the undisputed facts, the persons to whom the libel was published had no corresponding interest or duty. It was argued by the defendants' counsel that an addition or qualification ought to be engrafted on the proposition of law which I have mentioned—viz., that the occasion would be privileged, although there was no corresponding interest or duty in the person to whom the libel was published, if the defendant bonâ fide and reasonably believed that that person had such an interest or duty. I do not believe that to be the law. I do not see how the occasion, if not otherwise privileged, can become privileged because the defendant believes that it is privileged. As was pointed out by Lindley, L.J., in the case of *Stuart* v. *Bell* (1), the question whether the occasion is privileged does not depend upon the defendants' belief that it is so.

It has been said that there are authorities which bind us to hold that the contention for the defendants is good law. I do not think it necessary to deal with the cases cited, for they do not support the contention. The best authority in the defendants' favour is the Irish case of *Waring* v. *M'Caldin* (2), in which Fitzgerald, B., in laying down the law as to what constituted a privileged occasion, undoubtedly used words to the effect that the occasion was privileged where the publication was to a person whose duty the defendant reasonably believed it to be to inquire into and redress the injury of which the defendant was complaining. I do not think that that proposition is warranted by law. As I have said, an occasion is not rendered privileged by the fact that the defendant reasonably believes that it is privileged.

I think, therefore, that the learned judge who tried the case, on the facts as proved to him, ought to have ruled that the occasion was not privileged. Being, however, pressed by the defendants' counsel with the contention for which he has argued before us, the judge appears to have thought it safer to put the questions which he did to the jury. I agree with the Master of the Rolls that he need not have done so, but he did so in favour of the defendants. The jury found that the defendants honestly and reasonably believed that the board of guardians were the proper

(1) [1891] 2 Q. B. 341. (2) Ir. Rep. 7 C. L. 282.

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authority to whom to apply in respect of the matter complained of, but they would not find that the defendants wrote the last part of the letter from a sense of duty. Upon these findings, even if we were wrong in the view we have taken of the law, I think the defendants would be out of Court. For these reasons, I agree that the application must be dismissed.

DAVEY, L.J. I am of the same opinion. I do not think it necessary to state the reasons for my opinion at any length. I desire, however, to say that I agree with the Master of the Rolls in thinking that the judgment in *Tompson* v. *Dashwood* (1) cannot be supported. It is not the writing of a libel which is actionable, but the publication of it. The question, whether the occasion on which such publication takes place is privileged, depends, in my opinion, on the question whether there is in fact an interest or duty in the person to whom the libel is published: I cannot think that the mistake of the defendant in addressing the communication to the wrong person, or his belief, however honest, that the person to whom it is published has a duty or interest in the matter, can make any difference with regard to the question whether the occasion is privileged. I do not think it necessary to discuss all the authorities that have been cited to us; but in my opinion none of them, except the case of *Tompson* v. *Dashwood* (1), really supports the proposition put forward by the defendants' counsel. On the other hand, the expressions used by Lindley, L.J., in the case of *Stuart* v. *Bell* (2), are adverse to it. I ought to refer to the dictum of Fitzgerald, B., in the Irish case of *Waring* v. *M'Caldin.* (3) With great respect to that learned judge, I must say that I agree with the Master of the Rolls in thinking that that dictum must be considered to have been uttered per incuriam.

Application dismissed.

Solicitors for the plaintiff: *Rowcliffes, Rawle & Co., for J. Trevor Davies, Yeovil and Sherborne.*

Solicitors for the defendants: *Taunton & Dade, for Sir R. W. Howard, Weymouth.*

(1) 11 Q. B. D. 43. (2) [1891] 2 Q. B. 341.
(3) Ir. Rep. 7 C. L. 282.

E. L.

[IN THE COURT OF APPEAL.]

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April 19.

FLOWER *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Infant—Contract not for Benefit of—Agreement that Railway Company shall not be liable for Negligence towards Infant Passenger.

The plaintiff, a boy between thirteen and fourteen years of age, who was employed at a colliery, entered into an agreement with a railway company by which, in consideration of their permitting him to travel by their railway to and fro between the place where he lived and the colliery, under a certain special arrangement made between the colliery proprietor and the company, he agreed that neither he nor his executors or administrators or relatives should have any claim against the company by reason of any accident, injury, or loss, which might happen to him or his property while upon their railway, notwithstanding that such accident, injury, or loss was occasioned by the negligence of the company or any of their officers or servants; and further, that he, his executors and administrators, would indemnify the company from and against all loss, costs, damages, and expenses which they might incur by reason of any such accident, injury, or loss to him or his property, or by reason of any claim or legal proceedings instituted or taken by him or them against the company or any of their officers or servants in respect thereof:—

Held, that this agreement was so much to the detriment of the plaintiff as to be unfair to him as being an infant, and, therefore, it was not binding upon him.

APPLICATION by defendants for judgment or new trial.

The action was brought by an infant by his next friend to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendants' servants. The defendants in their defence denied negligence on their part, alleged contributory negligence on the part of the plaintiff, and set up an agreement between the plaintiff and themselves as after mentioned.

At the trial before Kennedy, J., with a jury, at Cardiff Assizes, the facts, so far as material to this report, appeared to be as follows:—

The plaintiff, who was a boy between thirteen and fourteen years of age, was employed at the Hollybush Colliery. It appeared that, by arrangement between the owner of the colliery and the defendants' company, the latter ran trains, for the

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carriage of colliers employed at the colliery who resided at a place called Blackwood, to and fro between that place and Hollybush, the owner of the colliery paying the defendants according to the number of colliers so carried by them, and the colliers themselves receiving free passes. Except by train, there was no practicable mode of access to the colliery from Blackwood. The plaintiff, who lived at Blackwood, had signed an agreement with the defendants, similar to agreements signed by other colliers employed at the colliery who lived there, which was in the following terms: "I, the undersigned, in consideration of you (the London and North Western Railway Company) permitting me to travel by your railway between Blackwood and Hollybush stations, either by the mineral, goods, or passenger trains, as may be most convenient to you, at certain agreed reduced rates, do hereby agree that neither I, nor my executors, or administrators, or relatives shall have any claim against you by reason of any accident, injury, or loss, which may happen to me or my property, while joining, travelling by, or alighting from such trains, or while upon your railway or property, notwithstanding that any such accident, injury, or loss is occasioned by the negligence of you or any of your officers or servants; and further that I, my executors and administrators will indemnify you from and against all loss, costs, damages, and expenses, which you may incur by reason of any such accident, injury, or loss to me or my property, or by reason of any claim or legal proceedings instituted or taken by me or them against you or any of your officers or servants in respect thereof." In order to leave the station at Blackwood, passengers from Hollybush had to cross the line by a level crossing. On the occasion in question the plaintiff, who had arrived at Blackwood by a train of the defendants from Hollybush, was so crossing the line, when his foot was run over by an engine of the defendants, and he was knocked down, and sustained injuries in consequence. The jury, in answer to questions left to them by the learned judge, found that the accident happened through the negligence of the defendants' servants, that the plaintiff was not guilty of contributory negligence, and that the agreement made as above mentioned was not beneficial and fair to the plaintiff as being an infant, and

they assessed the damages at 175*l.*, for which amount the judge gave the plaintiff judgment.

Bailhache, (*B. F. Williams, Q.C.*, with him), for the defendants. The defendants are entitled to judgment. The agreement made between them and the plaintiff was binding upon the plaintiff, notwithstanding that he was an infant. They are therefore not liable. The test laid down in *Corn* v. *Matthews* (1) as applicable to such cases is whether the agreement taken as a whole is unfair to the infant. That question must be considered with reference to the time when the agreement was made, not by the light of the events which have subsequently occurred. This agreement was one which was accepted by the other colliers circumstanced similarly to the plaintiff, and it is submitted that, taken as a whole, it is clearly a very beneficial agreement to a person in such a position. He gets carried to his work and back every day without having to pay anything—a very substantial benefit to a person in that rank of life—and in return he accepts a risk which, having regard to the small proportion borne by the accidents on railways to the number of persons carried, may be considered as almost infinitesimal. Can it be doubted that any one in the position of the plaintiff would gladly avail himself of the opportunity of entering into such an agreement? How can it be said under these circumstances that such an agreement is inequitable? [He also cited *Leslie* v. *Fitzpatrick* (2); *Fellows* v. *Wood* (3); *De Francesco* v. *Barnum*. (4)]

Abel Thomas, Q.C., and *S. T. Evans*, for the plaintiff, were not called upon.

LORD ESHER, M.R. The question is whether the agreement in this case is so far prejudicial to the infant as to be unfair to and therefore not binding upon him. That was a question for the judge to determine. It was argued that this agreement was fair and reasonable at the time when it was made, though in the result it has turned out onerous to the infant. I cannot attribute

(1) [1893] 1 Q. B. 310.
(2) 3 Q. B. D. 229.
(3) 59 L. T. 513.
(4) 45 Ch. D. 430.

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any weight to that argument, when I consider that the agreement was made with regard to, and in anticipation of, the very case which has now happened. The effect of the agreement is that, however negligent the company may be, for instance, even if the directors themselves omit to do something which it is obviously their bounden duty to do for the safety of passengers, and are guilty of the most atrocious neglect of their own rules, nevertheless this boy of thirteen agrees that he is not to be entitled to any compensation from the company for any injury, however serious, which he may sustain through such default. Furthermore, the agreement contains the absurd provision that, if the boy is killed and an action is brought in respect of his death under Lord Campbell's Act, a thing which he cannot prevent, his executors or administrators are to indemnify the company against the damages and costs in such an action. It appears to me that such an agreement is, as regards an infant, unfair and unreasonable, and therefore is not binding on him. The application must be dismissed.

A. L. SMITH, L.J. The question in such a case as this, as I understand it, is whether the agreement, taken as a whole, is so much to the detriment of the infant as to render it unfair that he should be bound by it. That question is for the judge to determine, when he has got any facts found which may be necessary for its determination. The agreement in the present case is in effect that, if the company will carry the infant in their trains, he agrees that they shall not be bound to take any care in so doing, that they may be guilty of any negligence towards him, and, however severely he may be injured in consequence, they shall not be liable to make him any compensation whatever. It is argued that this agreement is not so detrimental to the infant as to be unfair to him. I cannot agree with that contention. I think that such an agreement is not a fair agreement to make with an infant. Moreover, the defendants were not carrying the boy for nothing; they were carrying him on payment to them by his employer, which made it the more unreasonable that they should be absolved from all responsibility for negligence. For

these reasons, I think that this agreement was not binding on the plaintiff.

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DAVEY, L.J., concurred.

Application dismissed.

Solicitors for plaintiff: *Metcalfe & Sharpe, for T. S. Edwards, Newport.*

Solicitors for defendants: *Thomas White & Sons, for Gustard & Waddington, Newport.*

E. L.

[IN THE COURT OF APPEAL.]

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March 19.

THE HULL DOCKS COMPANY, AT KINGSTON-UPON-HULL, APPELLANTS; THE GUARDIANS OF THE POOR OF THE SCULCOATES UNION, IN THE BOROUGH OF KINGSTON-UPON-HULL, RESPONDENTS.

Poor-rate—Rateable Value—Docks—Docks in several Parishes—Dock Dues—Apportionment in Different Parishes—Dock Railways—Incapacity to charge Tolls—Annual Value—Hypothetical Tenant—6 & 7 *Wm.* 4, *c.* 96, *s.* 1.

The undertaking of a dock company, authorized by various Acts of Parliament, consisted of a number of docks, some with access to one another, and some separate from the others, and quays, wharfs, warehouses, workshops, and other works, connected with the various docks. The docks were situated in four parishes in the respondent union, and in some cases a dock was situated partly in one parish and partly in another in the union, and in other cases partly in the parish in the union and partly in a parish outside the union. One dock due was taken for the use of all or any of the docks, and dock rents were charged for vessels remaining in the docks beyond a certain time. The dock company prepared separate accounts of the receipts and expenditure in each parish, shewing the amount of dock dues and rents earned in each parish. The respondents ascertained the rateable value of the whole undertaking, and from this they deducted the rateable value of all property other than the docks. The balance, representing the rateable value of the docks only, was divided among the parishes in the proportion that the water area in each parish bore to the entire water area of the docks. On appeal against an assessment made upon this footing:—

Held (by Lord Halsbury, and Lopes and Kay, L.JJ.), that as it was shewn to be practicable to ascertain the earnings in respect of dock dues and rent in each parish, the assessment ought to be made upon the basis of the earnings in each parish, and that the assessment was bad.

Reg. v. *Hull Dock Co.* (18 Q. B. 325) distinguished and explained.

A dock company were authorized by statute to make junctions between the dock railways and the line of an adjoining railway company, but no tolls were

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to be taken by the dock company for the use of the dock railways, or of their tramways in connection therewith:

Held (by Lopes and Kay, L.JJ., Lord Halsbury dissenting), that the incapacity to take tolls did not exempt the dock company from liability to be assessed in respect of the railways and tramways at the amount at which they might, but for the restriction on taking tolls, be let to an hypothetical tenant.

APPEAL from the judgment of the Queen's Bench Division in a case stated as an award by an arbitrator, on an appeal to quarter sessions against assessments to the poor rates and rates made on the basis of such assessments.

Portions of the appellants' docks are situated in four parishes in the respondent union, named respectively, Sculcoates, Newington, Drypool, and Garrison Side, and the questions raised by the case were, as to the mode in which and the amount at which the appellants should be rated in each parish. The main question was, whether the method adopted by the respondents of finding a rateable value of the dock portion of the appellants' undertaking, and apportioning the amount between the four parishes in proportion to the water area of the docks and basins in each parish, was right.

The dock company was incorporated by 14 Geo. 3, c. lvi., with power to make a basin or dock near the River Hull for the reception of ships and vessels, with a quay or wharf and other necessary works, and to charge rates or duties for vessels using the same. The dock made on the authority of this Act is now called the Queen's Dock. By subsequent statutes the powers of the dock company to construct docks and to levy tolls were extended. Under the powers so conferred the dock company constructed the Humber Dock, Prince's Dock, Victoria Dock, Railway Dock, Albert Dock, Sir William Wright Dock, and St. Andrew's Dock, and certain quays, wharfs, warehouses, workshops, and other works. The dock company has power conferred on them to levy certain specified rates of wharfage for goods, wares, and merchandise landed or discharged upon or loaded or delivered from the company's quays or wharfs. Such rates were in addition to the dock duties. The dock company were also authorized to charge dock rents for vessels remaining in the docks beyond a certain time.

The Queen's Dock, Prince's Dock, Humber Dock, and Railway Dock communicate directly with each other and with the River Humber, and also, by crossing the River Hull, with a basin called the Drypool Basin and the Victoria Dock. The Albert Dock and Sir William Wright Dock communicate with each other, but with no other dock except by vessels passing out into the River Humber. The St. Andrew's Dock communicates with none of the other docks except by way of the River Humber.

A part of the Queen's Dock and the deal yards adjoining are within the parish of Sculcoates; a part of the Victoria Dock and the deal yards and timber ponds adjoining, and also a part of Drypool basin and quay, are within the parish of Drypool; a part of the Victoria Dock and a part of Drypool Basin, with the yards and depôt adjoining, are within the parish of Garrison Side; and St. Andrew's Dock is wholly within the parish of Newington. Other portions of the dock company's property are not within the Sculcoates Union.

The payment of one set of dock dues entitles a vessel to the use of any of the docks; but particular docks are in practice used by particular trades, and are fitted with conveniences for carrying on such trades.

For the purpose of arriving at the rateable value the appellants prepared separate accounts of the receipts and expenditure for each of the parishes in the respondent union. So far as the receipts were concerned their method of doing this was stated thus in the case:—

26. The dock dues are credited by the appellants to the dock in which the vessel discharged, each vessel that had gone into dock being traced for the purpose from the company's accounts. In the case of the Queen's Dock, which is partly in the parish of Sculcoates and partly outside the respondent union, the dock dues for vessels which had discharged within the parish were all credited to the parish. In the case of the Victoria Dock, which is partly within the parish of Drypool and partly in the parish of Garrison Side, the vessels engaged in foreign trade, which represent 92 per cent. of the whole, were similarly traced and accounted for to each parish; while as to the remaining 8 per cent., which represent the vessels engaged in the coasting trade,

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they were divided between the two parishes in the proportion of the lineal yardage in each parish of available quay berthage space, or, in other words, of quay frontage, in the dock. The receipts for dock dues were similarly treated as to Drypool Basin, where the foreign vessels are to the coasting vessels in the proportion of 84 and 16 per cent. Where a vessel discharged in a dock situate in one of the respondent parishes and left to load elsewhere, one moiety only of the dock dues received in respect of such vessel was credited to such docks; and similarly with vessels which had discharged in other docks, and afterwards used the Queen's or the Victoria or the St. Andrew's Dock for loading.

27. The dock rent on vessels, being the charge made for vessels remaining more than three months in dock, was credited by the appellants to the parish in which the vessel lay while earning the rent, the practice being for a vessel to remain in the same dock when lying up; though such rent would be equally payable whether the vessel remained in one dock during the whole period for which it was charged, or in several docks successively.

28. The dock rent on craft, being the sums received for craft which remained more than seven days in dock, was credited by the appellants to the dock where the craft were when earning the rent; but as to the Queen's Dock and the Victoria Dock it was further divided between the parishes in which those docks are situated in the proportion of quay berthage in each. The whole amount received for dock rent on vessels and dock rent on craft was comparatively small.

29. The account of receipts for inward wharfage (which is payable for goods landed or discharged upon the respective wharfs or quays) is kept separate by the appellants for each of the parishes of Sculcoates and Newington, and such receipts were credited to the parish where the goods were so landed on the quays. In the case of the Victoria Dock, the receipts under this head, which were also the annual receipts for goods landed at that dock, were apportioned between Drypool and Garrison Side parishes on the same principle as the dock dues.

30. The amounts received for outward wharfage, except as to

certain sums which were so small as not to affect the principle, were credited by the appellants to the parishes in respect of which they were received; and quay rentals, yard rentals, and warehouse rentals, and the sums received for labourage (that is, the sums received from shipowners and merchants and paid to the men employed for labour on and about the quays), and crane, hoist, and bogey hire, were similarly dealt with.

With reference to expenditure the case stated as follows:—

31. The appellants allocated to each parish such proportion of the total wages (other than labourage), cost of quay and road lighting, and general management expenses, as the gross receipts in that parish bore to the gross receipts of the whole undertaking. The repairs of tenant's working plant were taken in the proportion which the tenant's working plant in the particular parish bore to the whole of such plant; and similarly with the repairs to the landlord's capital, such as brick buildings, wharf and quay walls, and other property fixed to the freehold. The expenses of dredging were taken in each parish in proportion to the quantity of mud dredged in such parish; but in the Queen's Dock 40 per cent. of the mud dredged in the whole dock was taken for the parish of Sculcoates, as being the proportion of water area of the dock in that parish. The cost of working the hydraulic machinery at the Victoria Dock was apportioned between the Drypool and Garrison Side parishes in the ratio of the gross receipts; while in Newington parish a tenth of the whole cost of working the machinery there was allocated to the parish as hereinbefore stated (in a previous paragraph it was stated that one-tenth of the cost of working the pumping-station was a fair apportionment to this parish). The cost of labourage was proximately the actual cost in each parish.

32. As to the items making up the landlord's capital, a value was put by the appellants upon each of the buildings and other structures as they stood in each parish; except the fixed machinery at pumping-stations, which was apportioned among the parishes in the ratio of the gross receipts. With reference to the items making up the tenant's plant, certain things, such as keel blocks, timber bogeys, and moveable cranes, are used in particular parishes only, and were put in the accounts for those

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parishes respectively. The dredging plant was apportioned according to the quantity of mud raised in each parish. The remainder of the tenant's plant was apportioned in the ratio of the gross receipts.

The method of the respondents in arriving at the rateable value in the different parishes was thus stated:—

33. The respondents, on the other hand, first obtained a rateable value for the whole estate by taking the whole receipts and expenditure from the dock company's accounts and making the usual allowance for tenant's profits and statutable deductions by taking percentages upon the estimated value of the tenant's plant and landlord's capital respectively. They then made an allowance for repairs, and from the rateable value so ascertained for the entire estate they deducted the rateable value of all warehouses, dock offices, graving docks, sheds, yards, and cattle depôts, taking the remainder as representing the rateable value of the docks only, and apportioning the amount between the four parishes in proportion to the water area of the docks and basins in each parish. The rateable value of the whole of the appellants' property in any one parish was made up of the rateable value of the dock therein so obtained, added to the rateable value of the particular warehouses or other indirectly productive property in the parish.

34. The items of receipts so included by the respondents in the account for the entire estate comprised dock dues, labourage, warehouse and quay rents, receipts from two graving docks, lamp rentals, receipts from Queen's Dock ferry (which crosses the Queen's Dock), inward and outward wharfage, and receipts from the foreign cattle depôt.

A further question was raised in the case as to the rateable value of certain railway and tramway lines.

Under 24 & 25 Vict. c. lxxix., one of the dock company's Acts, by s. 53, the company were authorized to make junctions between the dock railways and the North Eastern Railway at their own expense; but no tolls were to be taken by the dock company for the use of those dock railways or of the tramways of the dock company in connection therewith. The North Eastern Railway is the only railway system having access to the

docks, and they have for several years used and continue to use the dock company's railway and tramway lines for the passing of traffic between the docks and the railway company's line. For such user the railway company paid the dock company a sum of 5000*l.* a year in each of the five years ending December, 1890. In the year 1891, although the user continued the same as before, they only paid a sum of 350*l.*, which was paid for the use of certain lines laid under special agreement wholly in the parish of Garrison Side, and this sum was included in the appellants' receipts in arriving at the rateable value of their property in that parish. The contention for the respondents was that the rent which a tenant might be reasonably expected to give for the whole of the railway and tramway lines used by the North Eastern Railway in the respondent parishes ought to be taken into consideration in determining the rateable value of the appellants' property therein. For the appellants it was contended that all except the 350*l.* which the North Eastern Railway Company continued to pay should be excluded from consideration in determining such rateable value, on the ground that by the 53rd section of 24 & 25 Vict. c. lxxix., no tolls are to be taken for the use of the lines, and no rent was in fact paid in the preceding year.

The arbitrator found as a fact that the North Eastern Railway Company or some other tenant could be found who would pay a rent for the lines beyond the 350*l.* above mentioned, if such rent could be legally exacted by the appellants in view of the section above referred to.

The Divisional Court (Mathew and Wright, JJ.) held that the rate was bad, and remitted the case to the arbitrator, with directions as to the principle that should be adopted in rating the different docks; and they held that, in respect of the railways, the appellants, being forbidden to take tolls, were only assessable in respect of the amount they actually received.

The respondents appealed.

1893. Dec. 14. *Lawson Walton, Q.C.*, and *R. Cunningham Glen*, for the respondents, in support of the appeal. The contention of the respondents is that the earnings of the dock company

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attributable to the docks must be estimated, and the amount divided between the parishes according to the extent of the water area in each parish. This course would be consistent with *Reg.* v. *Hull Dock Co.* (1) Since 1852, when that case was decided, other docks have been constructed, but there is still but one undertaking. Some of the new docks are unconnected with others of the docks; but that was equally the case with regard to the docks that existed in 1852. Wightman, J., in the case already cited, speaks of the system being virtually one dock; but this must mean, not one dock in the sense of physical connection, but of unity of property and management; and the case shews that in the opinion of the Court, for purposes of rating, it could not matter whether the component parts were separate or not. It is a fallacy to say that dues are earned in a particular dock where the vessel discharges, for there is one payment of a dock rate for the use of all the accommodation of the various docks.

The right mode of assessment is to arrive at the rateable value of the docks, and then apply some principle of apportionment, and this is what the respondents have done. The assessment committee have access to the accounts of the company, and know their gross receipts; but they cannot trace the ships that use one dock or another, or frame an assessment on that footing. The case does not shew that the appellants ever arrived at a rateable value of the whole undertaking, and, even on the system adopted by them, they in some instances resort to apportionment. The principle adopted by the appellants could only be applicable if it were possible to judge what a tenant would be likely to give for the portion of the undertaking in any given parish, and that, in the case of a single complex undertaking like this, is incapable of being ascertained.

As to the railways, the effect of the decision in *London County Council* v. *Churchwardens of Erith* (2), is that the rent which an hypothetical tenant would pay for the docks as they are—that is, including the railways—is the test of the value of the occupation, even though the owner has no power to take tolls.

Bosanquet, Q.C., and *J. R. Marchant*, contrà, for the company.

(1) 18 Q. B. 325. (2) [1893] A. C. 562.

The plan of assessing the company's property in each parish is practical, and ought to be adopted. This conclusion is in accordance with the principle stated in *Reg.* v. *Hull Dock Co.* (1), that the Court has adopted the parochial earnings principle wherever it could be applied. The actual decision in that case is not now applicable. The docks are not now an area which of necessity must be treated as a whole, but are made up of a number of separate docks, and the returns in respect of the trade of each can be kept separate. The *Mersey Docks* v. *Liverpool* (2) shews that the Hull Dock case can only be supported on the ground that it was impossible in 1851 to do anything but treat the receipts of the different docks as if they were all one. The difficulty of applying the principle adopted by the respondents in arriving at the rateable value in each parish is apparent when it is considered that the railway, the quays, warehouses, and other works all contribute to the earning of direct profit by and enure to the general benefit of the docks, yet the land area is not taken into account.

With regard to the railways and tramways, the case of the *Churchwardens of West Ham* v. *London County Council* (3) is not applicable. No tolls can be charged and no profit can accrue to the dock company other than the indirect profit to the undertaking by the increased facilities for carrying it on, and this is taken into account in the rating of the whole.

R. Cunningham Glen, in reply.

Cur. adv. vult.

1894. March 19. The following judgments were read:—

LORD HALSBURY. I think there can be no doubt but that the rate is bad.

Bayley, J., in the case of *Rex* v. *Kingswinford* (4), explains very clearly the principle upon which rates should be assessed upon one profit-earning undertaking which extends into different parishes. The learned judge was there dealing with a canal; but considerations arose in that case analogous to those that arise here. "I am of opinion," said he, "that the company

(1) 18 Q. B. 325.
(2) Law Rep. 7 Q. B. 643.
(3) [1893] A. C. 562.
(4) 7 B. & C. 236.

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ought to be rated in each particular parish in proportion to the profit which they derive from the land there used by them for the purpose of the canal. If a canal runs through six different parishes, and there is the same traffic through the whole line of the canal, every part of the canal will earn an equal proportion of the tolls. But it may happen that, in that part of the canal situate in one parish, there may be double or treble the traffic which there is in any other of the six. Why are the other parishes to have any part of the tolls earned in that parish? The land in those parishes contributes nothing towards earning the sum derived in the other parish from the use of the land there. The true principle is this: a canal company is to contribute to the relief of the poor in each parish through which the canal passes in proportion to the profit which they derive from the use of their land in that parish. If the profit arising from a given quantity of land vary in different parishes, the rate must vary in the same proportion."

That principle, obviously just, considering the parish as one area of rateability, and having to discharge its own burdens and deriving its means of discharging them from its own area of rateability, has been adopted and followed ever since; and even if it were not so equitable or right as I think it is, it would be a serious thing to disturb it after nearly seventy years of undisturbed acquiescence by all Courts.

In saying that it has been uniformly followed, I do not except the case so much relied upon—*Reg.* v. *Hull Dock Co.* (1)—inasmuch as the cardinal fact relied on in that case was that the vessels using the whole or any one dock paid but one toll, which made the vessel free of all. See Erle, J.'s, observations at p. 338, and Lord Campbell's, at p. 339, where he says: "If the company had docks in the Humber and Tyne, and took one toll for the use of both, would not each dock be the meritorious cause?"

Apart, therefore, from the change which has taken place in the construction of these docks, the findings of the special case, which were then being discussed, compelled the Court to treat as the hypothesis of fact upon which they were to give judgment that it was one great dock, the "meritorious cause" of profit

(1) 18 Q. B. 325.

being equally distributed over the whole, and, as Blackburn, J., explains in *Mersey Docks* v. *Liverpool* (1), the Court thought in deciding the matter that the different docks formed one indivisible dock, and that there was no way of applying the parochial principle except by saying, Here is the one entire rent which a man will give for the whole dock, and each parish must have a portion of the earnings according to the acreage principle. The findings in the case before us are altogether different. The accounts, which appear to have been kept with great care and precision, shew that there is no difficulty in appropriating what has been called the "meritorious cause" to each parish; and it is, therefore, quite clear that the ratio decidendi of the case relied on by the respondents makes it an authority against them. The rate must, therefore, be amended.

With respect to the railways and tramways. The statements of fact in the case are somewhat obscured by mixing up the facts themselves with the contentions made in respect of them. If I rightly understand the paragraphs which deal with this matter, they amount to this. That in and about various parts of the Hull Docks there are lines of rails and trams laid down on land belonging to the dock company, and included in their undertaking, and that their principal, if not exclusive, use was to convey goods to or from the North Eastern Railway in connection with their trade as a dock company. For the land so used, enhanced in value as it was by the use to which it was put, quite apart from the arrangement by which the North Eastern paid them 5000*l.* a year, they were and are clearly rateable. It is not here, however, a question of rateability or non-rateability, but of quantum; and, in order to determine that question, one must look at what are the sources of profit of which the subject of rating under debate is susceptible.

By the Hull Dock Act (24 & 25 Vict. c. lxxix.), it is enacted that the junctions between the dock railways and the Hull and Selby or North Eastern Railway shall be made under the direction and to the reasonable satisfaction of the engineer for the time being of the North Eastern Railway Company, and at the expense of the company, and no tolls shall be taken by the

(1) Law Rep. 7 Q. B. 643, at p. 651.

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company (i.e., the dock company) for the use of those dock railways or of the tramways of the company in connection therewith.

How the North Eastern Company came to pay 5000*l.* a year with that section before them is not explained; but it is enough for my purpose to say that no such source of profit is by law open to the dock company, and the arbitrator has made his finding that a tenant might be found willing to pay some such sum dependent upon the question whether "such rent" can be legally exacted.

It seems to me that no toll, or rent in lieu of toll, can be legally exacted for the use of the dock railways and tramways, and that no such source of profit is to be attributed to the possession of all the railways and tramways belonging to the dock company.

I somewhat lament the loose mode in which the paragraphs are drawn. The phrase "to be taken into consideration" is misleading. Of course the rails and trams are to be taken into consideration so far as they form part of the machinery by which the dock carry on their business; what was probably meant was —whether, apart from their functions in adding to the value of the dock as a dock, some other railway would give a larger sum for the privilege of access to and user of the dock lines and tramways if no such statutory provision had prohibited it as a source of profit.

Another source of confusion has been introduced by mixing up "the lines" laid in Garrison Side under a special agreement, and upon a bargain that 350*l.* should be annually paid for them, with the lines and trams to which the Act applied. I assume for the purpose of what I am saying that the Garrison Side lines are not within the prohibition of the statute. A particular construction under a special bargain is made, and no question is raised in the case that for this special construction any more could properly be assessed than the sum which the dock company receive for it.

Here, again, I have to lament the looseness of the phraseology "the said lines." "The said rail and tram lines" mean alternately the lines other than those in Garrison Side, which I have

described as a special construction, and all the lines and tramways including the special constructions.

The question, if I have rightly understood it, is the same as if it were sought to charge a railway with an enhanced value of its lines by reason of some other railways having running powers over it, though it has no power to charge anything for such running powers, because a tenant might be found to give a great deal for such running powers if the statutory restrictions were removed.

This is not as, I have said, a question of rateability or non-rateability, but of how much; and I think the observations of the Lord Chancellor in the case of *London County Council* v. *Churchwardens of Erith* (1) exactly point to the sort of case with which I am dealing. The Lord Chancellor says: "There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must of course be considered." What his Lordship was then considering was the limit placed by legislature on price or profit in respect of the undertakings to which the legislature has granted certain privileges; but it seems to me that the observations are strictly applicable, both in their principle and within the language in which the principle is expressed. To put it in plain terms, the legislature has prohibited letting these railways and trams for profit; and though this does not shield the dock from rateability, it does not justify taking into account as one source of profit that which the legislature has said shall not be a source of profit.

I am, therefore, of opinion that no additional value should be attributed to these rails and lines in respect of an hypothetical tenant hiring them.

(1) [1893] A. C. 562, at p. 592.

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LOPES, L.J. The main question in this case is how the docks are to be assessed to the poor-rate. Are they to be assessed on what is called the water area principle, or the parochial principle? There is a minor question with regard to the rating of the railways and trams which feed the docks.

I am of opinion the docks must be rated on the parochial system.

The respondents rely upon *Reg.* v. *Hull Dock Co.* (1) In that case it was held that the poor-rate upon so much of the docks as were in any parish must be assessed, not according to the actual receipts in that parish, but to the proportion which the area of the docks within that parish bore to the entire area of the docks; for that in such a case an assessment on the acreage principle was unavoidable, though an assessment on the basis of earnings within the parish is preferable when the nature of the case permits it.

In the *Mersey Docks* v. *Liverpool* (2) the principle of the decision in the Hull Dock case was explained, and it was held that in rating to the poor-rate the docks on the Liverpool side, they were not to be treated as one system of docks with those on the Birkenhead side, but the earnings and outgoings of each set of docks must be kept distinct, and the Liverpool docks rated according to the net earnings on that side. Blackburn, J., says (at p. 651): "What the Court thought in deciding the matter" (the Hull Dock case) "was, that the Victoria Dock and these other docks formed one indivisible dock, and as there was one payment made for entering into this one dock, although there were in fact several docks leading into each other, yet that there was no way of applying the parochial system except by saying, Here is the one entire rent which a man will give for the whole dock, and each parish must have a portion of the earnings according to the acreage principle. But we must follow the parochial system whenever it is possible."

Whether the facts in the Hull Dock case justified the conclusion that the several docks were one indivisible dock is a question with which I am not concerned. It is clear that such was the principle of the decision, the Court thinking it impos-

(1) 18 Q. B. 325. (2) Law Rep. 7 Q. B. 643.

sible in that case to apportion to each parish the earnings accruing in such parish. In *Mersey Docks* v. *Liverpool* (1) the Court, however, expressed a unanimous opinion that the acreage principle was only to be applied where the parochial principle was inapplicable, and they applied the latter principle in the case then before them.

The assessment by water area which the assessment committee have adopted in this case would be likely to produce great injustice. A parish might have a large water area with little profit, another parish a small water area with great profits. It would be highly inequitable that in the parish where little profits were made higher rates should be levied than in the parish where large profits were realized. But this would follow in many cases if the acreage principle were adopted. If the acreage principle were adopted in this case, a difficulty would arise with regard to the wharfage dues which are payable, not in respect of the water area, but in respect of the lands by the side of the docks; and I am at a loss to see how these could be apportioned according to the water area between the several parishes.

The docks with which we have to deal in this case cannot be said to be one indivisible dock. There are separate and distinct docks, which did not exist at the time of the decision in *Reg.* v. *Hull Dock Co.* (2) Modern experience, too, has made it plain that the principle of parochial assessment is not impracticable in cases like that now before us.

This case, in my judgment, is governed by the later cases of the *Mersey Docks* v. *Liverpool* (1) and *Mersey Docks and Harbour Board* v. *Overseers of Birkenhead* (3), and, for the reasons which I have given, is distinguishable from the old *Hull Dock Case.* (2)

That the parochial principle is the right one to adopt I entertain no doubt.

With regard to the rating of the railway and tramway lines used by the North Eastern Railway Company, it is contended by the respondents that the rent which a tenant might be reasonably expected to give for the whole of the railway and

(1) Law Rep. 7 Q. B. 643. (2) 18 Q. B. 325.
(3) Law Rep. 8 Q. B. 445.

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tramway lines ought to be taken into consideration in determining the rateable value of the appellants' property; it was contended, on the other hand, by the appellants that such rent ought to be excluded from consideration in determining such rateable value, save as to the 350*l.* which the North Eastern Railway still pay, because by the 53rd section of 24 & 25 Vict. c. lxxix., no tolls are to be taken by the appellants for the use of the said lines, and because no rent was in fact paid in the year immediately preceding the making of the rates which are the subject of appeal, or has been paid since December, 1890.

Previously to December, 1890, the North Eastern Railway Company had paid the appellants a sum of 5000*l.* a year in each of the five years ending December, 1890. In the year 1891, although the user continued the same as before, they only paid a sum of 350*l.*, which was paid under special agreement for the use of certain lines wholly in the parish of Garrison Side, and that sum has been included in the appellants' receipts to arrive at the rateable value of their property in that parish.

With reference to this contention, it is found in the special case as a fact that the North Eastern Railway Company, or some other tenant, could be found who would pay a rent for the said lines beyond the said 350*l.* a year if such rent can be legally exacted by the appellants in view of the section above referred to. The question is whether the rent which a tenant would pay for the said railway and tram lines ought to be included or excluded for the purpose of arriving at the rateable value.

Previously to the recent case in the House of Lords of *London County Council* v. *Churchwardens of Erith* (1), I should have thought the contention of the appellants maintainable, because they are precluded from taking any tolls for the use of the lines by the 53rd section of 24 & 25 Vict. c. lxxix., and there could, therefore, be no beneficial occupation in the sense of deriving any profit; but the last-named case has worked a revolution in the law of rating. It has been held that the true test of beneficial occupation is not whether a profit can be made, but whether the occupation is of value, and that the owner is to be regarded as one of the possible tenants in considering what rent may be

(1) [1893] A. C. 562.

reasonably expected, whether he has power to let the premises or not. Lord Herschell says (at p. 596): "If the hypothesis be admissible that the owner might himself be amongst the possible tenants, although, as a matter of fact, he could not be so, it seems to me no more violent hypothesis to conceive him as amongst the possible tenants, even although he may be subject to certain legal restrictions which would prevent his becoming so."

The arbitrator has found as a fact that the North Eastern Railway Company or some other tenant could be found who would pay a rent for the lines beyond the said 350*l.* a year if the appellants could let the said lines. It seems to me, in these circumstances, impossible to say that the occupation of the said lines by the appellants is not of value, nor can it be said that their incapacity to take tolls exonerates them from liability to be assessed as the hypothetical tenants of the lines.

It was contended that the dock company was indirectly rated in respect of these lines by the increased receipts arising from the traffic brought by these lines; but I understand the arbitrator to have found that a rent beyond the 350*l.* could be obtained in addition to all the profit obtained by the dock company by means of the lines, and I understand that the 5000*l.* a year formerly paid by the company was beyond and independent of such profits.

I am of opinion that the rent which a tenant might be reasonably expected to give for the whole of the railway and tramway lines used by the North Eastern Railway Company in the respondent parishes ought to be taken into consideration in determining the rateable value of the appellants' property.

KAY, L.J. The first question raised by the special case submitted by the arbitrator is as to the principle on which the Hull Docks should be assessed for the poor-rate.

The assessment committee, who appear in the name of the guardians, have found a rateable value of the dock portion of the company's undertaking, and have apportioned the same among the various parishes in which the several docks are situated, according to the water area of the docks in each of such parishes.

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The dock company contend that the rateable value ought not to apportioned by water area, but ought to be ascertained by attributing to each parish the receipts and expenditure in each, apportioning among them certain matters which are common to several parishes. There is a subsidiary question as to the rating of the railways communicating with the docks which I will deal with later on.

The system of assessment advocated by the dock company is what may be called shortly the parochial system—that is, making a separate valuation of the property in each parish so far as possible. Where a large undertaking like a railway or a system of docks extends into several parishes, there are receipts and expenses which are common to the whole undertaking—like, for instance, the terminal charges upon a railway—and these must be apportioned whatever principle of rating is adopted. But the tendency of modern decisions has been to adhere as closely as practicable to the parochial system of valuation.

The Hull Docks are situate on the side of the River Humber where it is joined by the River Hull. Some of these docks communicate with one another and with the River Humber at one end and with the River Hull at the other end of these connected docks. There are others which are separate and have no connection except with the River Humber. One of these separate docks called St. Andrew's is used almost exclusively for fishing vessels. Other docks, the Victoria and Queen's Docks, are used mainly for timber. The dock dues are all collected at the Custom House. The payment of one set of dock dues entitles a vessel to the use of any of the docks. There are hydraulic appliances common to several of the docks.

The special case in paragraphs 25 to 32 inclusive states how the dock company proposed to apply the parochial system of rating to these docks. I do not understand that any objection is made to the mode of applying this principle if it is adopted. The argument before us has been upon the question whether this principle should be adopted or not.

It is obvious that the apportionment by water area which the assessment committee have approved is a very rough mode of adjustment. One parish may have a considerable water area of

dock, which may be comparatively little used, while another, with a much smaller water area, may have a larger or more lucrative shipping traffic. To value both together and then apportion the value between the two according to the water area in each, might, in such a case, impose the heavier rate upon the parish which made least profit from the docks within it. Again, there are wharfage dues payable in respect, not of the water area, but of the wharves on the land by the side of the docks, and on no conceivable principle can these be apportioned between several parishes according to the water area.

But it is suggested that the assessment committee were bound by an authoritative decision of the Court of Queen's Bench to follow the course of rating which they have adopted. In 1851 the docks which then existed at Hull were rated by valuing them all together and then apportioning the rate among the several parishes in which they were situated, and the Court of Queen's Bench, in *Reg.* v. *Hull Dock Co.* (1), treating the whole of the docks then existing as one connected system, approved the principle of a valuation of all of them together, and an apportionment of the total value according to the water area of dock in each parish.

Since that decision, several new docks have been constructed. The Albert Dock in 1869, the Sir William Wright Dock in 1880, and the St. Andrew's Dock in 1883. Of these the Albert and William Wright Docks communicate with one another, but not with any other dock except by the River Humber. The St. Andrew's Dock communicates with none of the other docks except by way of the River Humber.

These alterations bring the case into a nearer resemblance to the later authorities of *Mersey Docks* v. *Liverpool* (2), and *Mersey Dock and Harbour Board* v. *Overseers of Birkenhead* (3), where an attempt was made to apply *Reg.* v. *Hull Dock Co.* (1) to the docks at Liverpool and Birkenhead, on opposite sides of, and only connected by, the River Mersey, which was more than a mile wide between the two. The Courts there applied the parochial system of rating, and explained the decision in *Reg.*

(1) 18 Q. B. 325. (2) Law Rep. 7 Q. B. 643.
(3) Law Rep. 8 Q. B. 445.

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v. *Hull Dock Co.* (1) by saying that the docks in that case were treated as one indivisible dock.

If that was the case in 1851, it certainly is not so now; and in my opinion we are bound by the course of authority to hold that in this case the parochial system of rating should be applied so far as possible.

The question as to the railways raises a difficult point. In the case it is stated that there are a number of railway and tram lines belonging wholly or jointly to the dock company, and in connection with the North Eastern Railway, which is the only railway system having access to the docks. For the use of these lines the North Eastern Railway paid the dock company 5000*l.* a year in each of the five years ending December, 1890. Since then they have only paid 350*l.* a year, which sum has been taken into calculation for arriving at the rateable value of the dock company's properties in the parish of Garrison Side, it being a payment for the use of certain lines in that parish under a special agreement. It seems to be admitted that the 5000*l.* a year could not legally be exacted, and that there is no power in the dock company to recover anything from the railway company for the use of these lines beyond the 350*l.* The arbitrator finds that a tenant could be found who would pay a rent for the lines beyond the 350*l.* a year if the dock company could let them. But they have no power to let the railways; and by s. 53 of 24 & 25 Vict. c. lxxix., no tolls for the use of these lines can be taken by the dock company. It is argued, however, that the effect of the recent decision in the House of Lords—*London County Council* v. *Churchwardens of Erith* (2)—is that the rent which would or might be given by an hypothetical tenant should be taken into account, although there can be no tenant by reason of the inability of the owner to let. The answer given is that the railways were a part of the dock system, and bring to the dock company indirectly a quantity of dock dues and wharfage which are taken into account in valuing the dock property for rating, and thus the dock company do pay for the railways indirectly to the full extent of any advantages they derive or can derive from them. When it is a question whether any rate or none should be paid, the rent which would

(1) 18 Q. B. 325. (2) [1893] A. C. 562.

be given by a hypothetical tenant may be a proper criterion. But to add such a rent in this case, it is argued, would be to make the dock company pay, not only for the actual value which the railways are to them, but for an additional hypothetical rent which they cannot possibly obtain. This would be, it is argued, an unreasonable application of the House of Lords decision. The hypothetical tenant referred to in the Rating Act (6 & 7 Wm. 4, c. 96), s. 1, is the tenant of at least the whole undertaking in the particular parish. Such a tenant would include the advantage of the railway connection in the rent he would give—that is, he would pay a larger rent by reason of the railway accommodation which would facilitate the traffic to and from the dock. This possible rent, it is said, is really accounted for. But the claim assumed an additional rent, not for the railway in that particular parish, but for all the dock railways—a rent obtainable from a railway company desirous of monopolizing the traffic to and from all these docks. This rent is not obtainable under the present state of circumstances. Possibly the North Eastern Railway Company might be inclined to give it to maintain their present monopoly, which, however, cannot be interfered with without connections being made with some other line, such as the Hull and Barnsley Railway, which is suggested. The argument is that the hypothetical tenant must be for the docks as they are, that is with the railway communication as it exists, which the dock company are powerless to alter.

On the other hand, the rent which the arbitrator finds could be obtained if the lines could be let would be an addition to all the profit obtained by the dock company directly or indirectly for these railway lines. For example, the 5000*l.* a year which the North Eastern Railway Company actually paid for some years was such an addition. The statute 6 & 7 Wm. 4, c. 96, s. 1, makes the rent that might be obtained from a tenant from year to year the criterion of value of such a property, and the House of Lords have decided that it is none the less a criterion because the company have no power to let. In short, tried by that test, the dock company are occupiers of railway and tram lines which have a value for which at present they are not rated. I think

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that this hypothetical rent ought to be taken into consideration, and that the rateable value of the lines should be taken on that basis.

Order varied.

Solicitors for appellants: *Chester, Mayhew, Broome, & Griffiths, for Thomas Holden, Hull.*

Solicitor for respondents: *J. W. Sykes, for Chatham & Son, Hull.*

A. M.

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April 9.

ROSE AND ANOTHER *v.* WATSON.

Rate—Assessment to Church Rate—"Full Annual Rent or Value"—Rateable Value—1 & 2 Geo. 4, c. cxiv. s. 8.

By 1 & 2 Geo. 4, c. cxiv. s. 8, the churchwardens of a certain parish were directed and required in each and every year to make a rate for certain purposes "on the full annual rent or value" of all houses, &c., rated or rateable for the relief of the poor of the parish:—

Held, that the words "full annual rent or value" were equivalent to "full net annual value," and that the rate could not be made on the gross estimated rental, but only on the rateable value of the premises.

CASE stated by justices under 20 & 21 Vict. c. 43.

The appellants, who were the churchwardens of St. Nicholas, Harwich, preferred an information against the respondent Watson, charging that he, being a person duly rated and assessed under and by virtue of 1 & 2 Geo. 4, c. cxiv. (1), in a certain

(1) By 1 & 2 Geo. 4, c. cxiv. (an Act for the completion of the rebuilding of the church or chapel of the parish of St. Nicholas, in Harwich, in the County of Essex), s. 8: "It shall be lawful for the said churchwardens and they are hereby directed and required in each and every year until all the moneys necessary to be borrowed under and by virtue of this Act and the interest thereof shall be paid off and discharged and the several other purposes of this Act shall be carried into complete execution, at any meeting or meetings to be holden in vestry for that purpose (of which meetings and of the purpose thereof notice in writing signed by the said churchwardens shall be given and published in the said church or chapel two Sundays at the least immediately preceding the same respectively) to make a rate or rates, assessment or assessments not exceeding six shillings in the pound in any one year on the full annual rent or value of all houses buildings premises lands tenements and hereditaments rated or rateable for the relief of the poor of the said parish of St. Nicholas on all and every the tenants and occupiers of the same parish and such rate or rates assessment or assessments shall be made at any time after the passing of this Act

sum, did not pay the said sum or any part thereof, but refused and neglected to do so after demand made by the appellants.

The case stated that the appellants had, at a duly convened vestry meeting on January 15, 1894, made a rate of 4*d.* in the pound on the gross estimated rental of the houses, &c., rated to the relief of the poor of the parish, and not upon the rateable value of the same, and that the rate was not submitted to the vote or approval of the ratepayers assembled at the vestry.

The respondent having refused to pay the amount in which he was assessed, the justices declined to enforce payment and dismissed the information on the grounds that the rate ought to have been ratified by the majority of the vestry meeting, and that it ought to have been made on the rateable value, and not on the gross estimated rental of the premises.

Crump, Q.C. (*Reginald Smith,* with him), for the appellants. The statute clearly imposes the duty of making the rate on the churchwardens alone, and it was no part of their duty to submit it to the vestry: *Rex* v. *Churchwardens of St. Mary, Lambeth.* (1) No doubt it is to be made at a vestry meeting; but that is for the purpose of notifying it to the parish. Parishioners are at common law obliged to repair the parish church, and cannot deliberate whether they will do so or not: *Burder* v. *Veley.* (2)

The words of the section are "full annual rent or value." That is equivalent to "gross annual rent or value." The word "full" is not found in any of the cases under the Waterworks Acts, and such cases have no application here.

Macmorran, for the respondent. It cannot have been intended that a vestry should be summoned merely to hear the churchwardens make a rate. The vestry must be called together for some purpose.

As to the second point, the terms "rent" and "annual value" are synonymous, and they have been defined as meaning net

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and shall be paid to and raised levied and collected by the churchwardens for the time being."

Sect. 12 gives power to the justices, in case of non-payment of the rate, on complaint by the churchwardens to enforce payment.

(1) 3 B. & Ad. 651.

(2) 12 Ad. & E. 233.

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rateable value: *Dobbs* v. *Grand Junction Waterworks Co.* (1); *Sheffield Waterworks Co.* v. *Bennett* (2); *Warrington Waterworks Co.* v. *Longshaw.* (3) The word "full" is not equivalent to "gross," as if it were it would imply a contradiction in terms, since it is settled that "annual value" means "annual net value." It only means that there should be no illegitimate deductions.

Crump, Q.C., replied.

CHARLES, J. In this case the justices dismissed an information which charged that the respondent, being a person duly rated and assessed under and by virtue of a certain Act of Parliament, had refused or neglected to pay a church rate, and this appeal is brought to test the correctness of that decision. Two points were taken before the justices. First, was the rate properly made by the churchwardens? Secondly, was the rate assessed on the right valuation?

Both points depend on the construction of s. 8 of 1 & 2 Geo. 4, c. cxiv. That section provided: "That it shall be lawful for the said churchwardens and they are hereby directed and required in each and every year until all the moneys necessary to be borrowed under and by virtue of this Act and the interest thereof shall be paid off and discharged . . . . at any meeting or meetings to be holden in vestry for that purpose . . . . to make a rate or rates assessment or assessments not exceeding six shillings in the pound in any one year on the full annual rent or value of all houses buildings premises lands tenements and hereditaments rated or rateable for the relief of the poor of the said parish of St. Nicholas on all and every the tenants and occupiers of the same parish and such rate or rates assessment or assessments shall be made at any time after the passing of this Act and shall be paid to and raised levied and collected by the churchwardens for the time being."

In this case the churchwardens for the time being made such a rate at a meeting holden in vestry for that purpose, but did not give the persons attending the vestry the opportunity of voting

(1) 9 App. Cas. 49. (2) Law Rep. 7 Ex. 409; 8 Ex. 196.
(3) 9 Q. B. D. 145.

against the rate. According to the old law, a rate made at a meeting of a vestry must be made with the consent of the vestry; but there are exceptions to that rule, and one of those exceptions is where a statute imposes on the churchwardens an actual duty of making a rate for a specific purpose. On that point, therefore, I think that the churchwardens were right, and that on the true construction of the section a duty was imposed upon them of making a rate for the purpose of paying off the money which had been borrowed without having regard to the wishes of the persons attending the vestry. I do not think that the words "at any meeting or meetings to be holden in vestry for that purpose" impose on the churchwardens any necessity to obtain the consent of the majority of the vestry meeting to the rate which they are making. There are many reasons why the rate should be made by the churchwardens at such a meeting; for instance, it would be a protection against the vexatious making of such a rate, and it would also be a convenient way of giving notice to the parish. It seems to me that looking at the whole section the duty is imposed on the churchwardens and on the churchwardens alone in unqualified terms of making this rate. On that point, therefore, I think that the justices were wrong and that the contention of the churchwardens was right.

But then comes the much more difficult question as to whether the rate was made on the right valuation. The churchwardens have made the rate on the gross estimated rental of the property occupied by the respondent, and they contend that they were justified in doing so by the language of the section, which says that the rate is to be made on the "full annual rent or value" of all houses, &c. Now, what is the meaning of that phrase? If it were not for the word "value" the inquiry would be into the meaning of the word "rent," and recourse could be had to the case of *Sheffield Waterworks Co.* v. *Bennett.* (1) It is true that the decision there was on a different Act, which enabled a company to levy a water rate; but the judgment of Lord Bramwell contains an elaborate discussion as to the meaning of the word "rent" in such a statute, and says that it is equivalent

(1) Law Rep. 7 Ex. 409; 8 Ex. 196.

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to "annual value." If therefore the word "rent" stood alone, I should, on the authority of that decision, say that the rate ought to be made on the full annual value of the premises. But it is unnecessary for me to do so, as the alternative phrase "annual value" is included in the section.

Now, in considering these words I cannot disregard the cases in which the meaning of such expressions has been explained. It is true that they were cases on other statutes, but, in my opinion, they lay down principles of wide application. Thus, in the case in the House of Lords of *Dobbs* v. *Grand Junction Waterworks Co.* (1), I find Lord Bramwell (at p. 54), discussing in general terms the meaning of the words "annual value" of premises. He says: "Now, without undertaking an all-sufficient definition, it seems to me that we may safely adopt that in 6 & 7 Wm. 4, c. 96, viz., 'the rent at which they might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent-charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any) necessary to maintain them in a state to command such rent.' This is their value." That, then, is as much as to say that the words "rent and annual value" are synonymous; and if the words "rent or annual value" in s. 8 of the Act now under consideration stood alone, we should be bound by that decision to say that they meant the net rent or net annual value of the premises as defined by 6 & 7 Wm. 4, c. 96. But does the insertion of the word "full" into the section make any difference? Of course, if the word "full" is equivalent to the word "gross," the argument for the churchwardens is well founded. Lord Bramwell, in the case I have already cited, says: "Value means net value; net value means value . . . . Now gross value is different from value." Can we say that "full value" is different from "value" and means "gross value." On consideration, I think that we cannot. The meaning of the phrase "full annual value" seems to me to be "full annual net value." I arrive at this conclusion in this way. Taking the definition of "value" which I have cited from Lord Bramwell, I find that "annual value" is "annual

(1) 9 App. Cas. 49.

net value," and "full annual value" is therefore "full annual net value." The value on which this assessment is to be made therefore is "the full annual net value"—that is, without any illegitimate deductions. It is worthy of notice that the phrase "full net annual value" is one known to the law. In the definition clause (s. 4) of the Public Health Act, 1875, I find that "rack-rent" is defined as meaning "rent which is not less than two-thirds of the full net annual value of the property out of which the rent arises; and the full net annual value shall be taken to be the rent at which the property might reasonably be expected to let from year to year free from all usual tenants' rates and taxes and tithe commutation rent-charge (if any) and deducting therefrom the probable average annual cost of the repairs insurance and other expenses (if any) necessary to maintain the same in a state to command such rent." That definition of "full net annual value" is therefore in terms the same as the definition of "annual value" in 6 & 7 Wm. 4, c. 96.

Whilst "gross annual net value" would be a contradiction in terms, therefore it seems that there is no such contradiction in the phrase "full net annual value." That, then, being the meaning of the phrase in this case, the churchwardens had only authority to make the rate on that value, and they were therefore wrong in making it on the gross estimated rental of the respondent's premises, and the justices were right in dismissing the information. It follows that, in my opinion, their decision must be upheld and this appeal dismissed.

Collins, J. I am of the same opinion. Two grounds are taken on behalf of the churchwardens, and if the justices were right on either ground in dismissing the information it becomes unnecessary to inquire into the other. I am of opinion that the rate was wrongly made on the gross estimated rental, and it is unnecessary for me to consider whether the rate was properly made by the churchwardens or not. I desire, therefore, to say nothing on that point.

On the other point—the question of the amount on which the rate ought to be made—I come to the same conclusion as my learned brother. The cases which have been cited have laid

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down the rule that the words "annual value" mean "net annual value," unless there is anything inconsistent in the context. It is true that those cases related to a water rate, and this is the case of a church rate, but the cases seem to me to be in pari materiâ. Now, is there anything in the context or general purview of this Act which prevents us from applying that definition? It is said that the word "full" must be read as equivalent to "gross." I do not think so. In my opinion, "full annual value" means "full net annual value;" and that such a phrase is not inconsistent or contradictory is shewn by the definition which has been cited from the Public Health Act, 1875.

The churchwardens, therefore, ought to have made the rate on the full net annual value—that is, the rateable value—and they were wrong in making it on the gross estimated rental. I agree that the justices were right in dismissing the information on this ground.

Appeal dismissed.

Solicitors for appellants: *Speechly, Mumford, Landon, & Rodgers.*

Solicitors for respondent: *Morris & Bristow.*

A. P. P. K.

1894

April 12.

IN RE BASSETT'S PLASTER COMPANY, LIMITED.

County Court—Jurisdiction—Company—Winding up—Powers of County Court Judge—Writ of Fieri Facias—Companies (Winding up) Act, 1890 (53 *&* 54 *Vict. c.* 63), *s.* 1, *sub-s.* 6.

Although s. 1, sub-s. 6 of the Companies (Winding up) Act, 1890, gives to a county court having jurisdiction to wind up a company "all the powers of the High Court" in respect of such winding up, the county court has no power to issue a writ of fieri facias addressed to the sheriff of the county, for the purpose of enforcing, by execution, an order of that court directing a person to pay moneys received by him on behalf of the company to the liquidator.

THIS was a summons, referred to the Court by Lawrance, J., at chambers, to set aside a writ of fieri facias issued in the county court of Warwickshire, holden at Birmingham.

By a special resolution, passed at an extraordinary general meeting of Bassett's Plaster Company, Limited, and duly confirmed, it was resolved that the company should be voluntarily

wound up under the Companies Acts, 1862 to 1890, and a liquidator was appointed for the purposes of the winding up. The paid-up capital of the company did not exceed 10,000*l.*, and its registered office was within the jurisdiction of the Birmingham County Court. The winding up was therefore in that court under the provisions of the Companies (Winding up) Act, 1890 (53 & 54 Vict. c. 63.)

Shortly after the passing of the special resolution, John Bassett, who was a shareholder in and managing director of the company, received debts due to the company amounting to about 189*l.*, which sum he refused to hand over to the liquidator.

On February 7, 1894, the deputy county court judge, on the motion of the liquidator, made an order that John Bassett should forthwith pay to the liquidator the sum of 189*l.*, moneys received by the said John Bassett on behalf of the company, and the costs of the motion, and that there should be no stay of execution.

John Bassett having failed to comply with this order, the deputy county court judge, on March 13, 1894, made a further order that the liquidator "be at liberty to enforce the order of this court made on February 7, 1894, by issuing execution by a writ of fieri facias addressed to the sheriff of Warwickshire against the said John Bassett" for 189*l.* and the costs.

The solicitor for the liquidator thereupon prepared a form of præcipe and writ of fieri facias directed to the sheriff of Warwickshire in the form used in the High Court, except that the writ was intituled "In the county court of Warwickshire holden at Birmingham" instead of "In the High Court of Justice, Queen's Bench Division," and in the body of the writ the words "in our said Court" were altered to "in the said county court."

The writ was approved by the registrar of the county court, who was also the district registrar of the High Court, and sealed with the High Court seal. On receipt of the writ the sheriff of Warwickshire entered upon John Bassett's premises and seized certain of his goods and effects, and was still in possession.

This application to set aside the writ was now made on behalf of John Bassett.

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IN RE BASSETT'S PLASTER COMPANY.

Dale Hart, for John Bassett. The writ of fieri facias should be set aside. No county court has any power to issue a writ in such a form. The proper course was for the liquidator to have applied to the county court judge for a direction to the high bailiff of that court to seize and levy on John Bassett's goods for the debt and costs. The Companies (Winding up) Act, 1890, s. 1, sub-s. 6 (1), does not enable county courts in enforcing their orders to address process to the officers of the High Court. By s. 32 "prescribed" means prescribed by general rules, and by rule 20 of the general rules of 1890, made pursuant to s. 26 of the Act, the high bailiff is made the officer to execute the orders and process of the county court in respect of the jurisdiction given by the Act.

Ashton Cross, for the liquidator. It is not desired to take the objection that in form the matter should have been brought before the Court on a motion for a prohibition instead of by this summons. Sub-s. 6 of s. 1 of the Act of 1890 gives the county court all the powers of the High Court for the purposes of the jurisdiction to be exercised. The county court, therefore, had authority to issue this writ of fieri facias directed to the sheriff. The ordinary jurisdiction of county courts has been largely extended in such of those courts as have jurisdiction in bankruptcy and in winding up. The powers of the Court of Chancery and of the High Court were given to county courts having jurisdiction in bankruptcy by the Bankruptcy Acts, 1869 (32 & 33 Vict. c. 71)

(1) Sect. 1 (sub-s. 1 and 3) of 53 & 54 Vict. c. 63, gives jurisdiction to the county courts to wind up companies where the capital of a company paid up, or credited as paid up, does not exceed 10,000*l.*, and the registered office of the company is situate within the jurisdiction of the county court.

By sub.-s. 6, "every court having jurisdiction under this Act to wind up a company shall, for the purposes of that jurisdiction, have all the powers of the High Court, and every prescribed officer of the Court shall perform any duties which an officer of the High Court may discharge by order of the judge thereof or otherwise in relation to the winding up of a company."

By s. 32 "prescribed" means prescribed by general rules.

By rule 20 of the Companies Winding up Rules, 1890, being the general rules made pursuant to s. 26 of the Act, "It shall be the duty of the high bailiff of a county court to serve such orders, summonses, petitions, and notices as the Court may require him to serve: to execute warrants and other process . . . and to do and perform all such things as may be required of him by the Court."

and 1883 (46 & 47 Vict. c. 52) respectively, and the orders of those courts might and may be enforced in manner prescribed by general rules. Under the Act of 1869 it was held, in *Reg.* v. *Judge of County Court of Surrey* (1), that a county court judge had power to attach for contempt of court a person who disobeyed a summons to attend and give evidence as to the bankrupt's estate. In that case, as Fry, L.J., pointed out, no rules had been made prescribing the manner in which the orders of the county court judge were to be enforced. So here, the rules made under the Act of 1890 are not exclusive; they are not intended to be a complete code of procedure, and where the manner in which the orders of the county court judge are to be enforced is left in doubt, the procedure must be adopted which would be followed if the matter were in the High Court. Assuming that rule 20 gives the high bailiff power to enforce the orders of the Court in a case like this, still it is not an exclusive power. The rule does not mention a writ, and recourse must therefore be had to the sheriff, who is the proper officer of the High Court to execute a writ of execution. The high bailiff cannot serve and execute process outside the district in which the county court has jurisdiction, and the officers of the county court are in a difficulty, because there are no forms in use in the county court which apply to such a case as the present.

[He also referred to *Ex parte Reynolds, In re Barnett.* (2)]

Macaskie, appeared for the sheriff of Warwickshire.

CHARLES, J. In this case John Bassett failed to pay over a sum of money to the liquidator of a company which was being wound up in the county court, and on February 7, 1894, an order of the county court was made that he should pay over the money, which he had received on behalf of the company during the course of the liquidation, and certain costs, and that there should be no stay of execution. Bassett did not comply with that order. Thereupon an order was made in the county court that the liquidator be at liberty to enforce the order of February 7, 1894, "by issuing execution by a writ of fieri facias addressed to the sheriff of Warwickshire against the said John Bassett" for the

(1) 13 Q. B. D. 963. (2) 15 Q. B. D. 169.

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Charles, J.

sum retained by him and the costs. On that a writ of fieri facias was afterwards issued in the county court. We are now asked to set that writ aside on the ground that the deputy county court judge had no authority to issue it. Whether he had authority or not depends upon the true construction of s. 1, sub-s. 6 of the Companies (Winding up) Act, 1890. Sect. 1 enables a company having a paid-up capital not exceeding 10,000*l.* to be wound up in the county court. Sub-s. 6 provides: [The learned judge read it.] It is alleged that those words, giving to the county court all the powers of the High Court, justified the deputy county court judge in directing the sheriff of Warwickshire by a writ of fieri facias to seize and levy on Bassett's goods. I cannot think the true meaning of the sub-section is that which is suggested. It is true that the power to issue a writ of fieri facias to the sheriff is one of the powers of the High Court, but I am of opinion that that power is not given to the county court judge by this Act. By s. 32 the word "prescribed" means prescribed by the general rules made under the Act, and the words "every prescribed officer" in sub-s. 6 of s. 1 refer to the high bailiff of the county court, who by the general rules (rule 20) is constituted the officer to execute the process of the court, and to do all such things as shall be required of him by the court, in respect of the jurisdiction given by the Act. If—as in *Reg.* v. *Judge of County Court of Surrey* (1)—no rules had been made prescribing the manner in which the orders of the county court judge were to be enforced, the question might be different, but in the present case I think that the judge, though he has all the powers of the High Court, must exercise those powers under the Act of Parliament which gives him jurisdiction, and by his own officers.

For these reasons I am of opinion that the writ of fieri facias directed to the sheriff was irregular, and should be set aside.

COLLINS, J. I am of the same opinion. I think that the legislature, in giving the county court judge all the powers of the High Court, has accompanied that gift with the condition that those powers shall be exercised through the officers of the county court, and therefore that the proper person to execute

(1) 13 Q. B. D. 963.

process in order to enforce the orders of the Court in the present case was the high bailiff of the county court, and not the sheriff of Warwickshire. I do not see the difficulty which is alleged to have been felt by the county court officers. The fact that they had no forms which applied to this case seems to me immaterial. I agree that the writ was irregular and should be set aside.

Application granted.

Solicitor for applicant: *F. Hatton, for Goodricke, Clarke & Smith, Birmingham.*

Solicitors for liquidator: *Harvey & Capron, for E. C. Newey, Birmingham.*

Solicitors for the Sheriff of Warwickshire: *Taylor, Hoare & Taylor, for R. C. Heath, Warwick.*

W. A.

WEGG PROSSER *v.* EVANS.

1894 April 7, 11, 14.

Joint Contractor — Guarantee — Cheque given for Liability on — Unsatisfied Judgment on Cheque—Action against Joint Contractor on Guarantee—Res judicata.

An unsatisfied judgment against one joint contractor on a cheque given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original contract.

The defendant and T. jointly guaranteed to the plaintiff the payment by a third person of his rent. A half-year's rent being in arrear, T. gave the plaintiff his cheque for the amount. The plaintiff sued T. on the cheque and recovered judgment, but such judgment was not satisfied. The plaintiff then sued the defendant on the guarantee:—

Held, that the causes of action upon the cheque and upon the guarantee were not the same, that consequently the principle of *Kendall* v. *Hamilton* (4 App. Cas. 504) did not apply, and that the judgment against T. afforded no defence to the action.

Drake v. *Mitchell* (3 East, 251) followed.

Cambefort v. *Chapman* (19 Q. B. D. 229) disapproved.

TRIAL before Wills, J., without a jury.

The plaintiff was the owner of a farm called Haywood Lodge Farm, which, in January, 1890, he let to one Thomas Williams.

On January 23, 1890, one John Thomas, of Market Street, Pontypridd, signed the following document addressed to the

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agents of the plaintiff, "Belmont Estate, Haywood Lodge Farm. I hereby agree to become joint security with Mr. John Evans of Tycha bach," the defendant, "for the due payment of the rent (385*l.* per annum) of the above farm by Mr. Thomas Williams. Yours, &c., John Thomas."

On January 27, 1890, the defendant signed a similar document similarly addressed, "Belmont Estate, Haywood Lodge Farm. I hereby agree to become joint security with Mr. John Thomas of Market Street, Pontypridd, for the due payment of the rent (385*l.* per annum) of the above farm by Mr. Thomas Williams. Yours, &c., John Evans." Default was made by Thomas Williams in payment of the half-year's rent due January 2, 1892, and application was made to John Thomas for such rent by the plaintiff's agents, to whom Thomas accordingly gave his cheque for the amount. The cheque being dishonoured, the plaintiff brought an action against Thomas on the cheque and recovered judgment. Execution was issued upon the judgment, but it was not satisfied. The plaintiff then brought the present action against the defendant upon his guarantee of January 27, 1890.

J. E. Bankes, and *Rhys Williams*, for the defendant. The two documents signed by Thomas and the defendant respectively together constitute one joint contract of guarantee. Wherever two persons promise generally to do some act, their promise will always, in the absence of words of severance, be regarded as creating a joint liability only, and not a joint and several liability: *White* v. *Tyndall* (1); Platt on Covenants, p. 117. Here there are no words of severance in the documents. But if the guarantee was a joint contract only, recovery of judgment against Thomas on the cheque, given in respect of the liability on that guarantee, is a bar to the present action. For the defendant has a right to have his co-guarantor Thomas joined as a co-defendant. But Thomas can no longer be so joined, his liability on the guarantee being merged in the judgment on the cheque. The cause of action on the cheque, and that on the guarantee, are substantially the same cause of action, both being

(1) 13 App. Cas. 263.

in respect of the same debt: *Bridges* v. *Berry*. (1) It is said in Byles on Bills, 15th ed. p. 311, that "judgment recovered on a bill or note is an extinguishment of the original debt, as between the plaintiff and the defendant." And that statement of the law was approved by Manisty, J., in *Cambefort* v. *Chapman*. (2) The principle therefore of *King* v. *Hoare* (3), and *Kendall* v. *Hamilton* (4) applies. The case of *Cambefort* v. *Chapman* (5), where an unsatisfied judgment against one joint contractor on a bill of exchange, given by him alone for the joint debt, was held to be a bar to an action against the other joint contractor on the original contract, is directly in point in the defendant's favour. The plaintiff having two modes of recovering one and the same debt, cannot, after pursuing one of those modes up to judgment, change his mind and adopt the other: *Buckland* v. *Johnson*. (6)

A. T. Lawrence, for the plaintiff. This contract of guarantee was not a joint contract, but joint and several. Whether a contract in any particular case is to be treated as of the one kind or of the other, must depend upon the intention of the parties, and not upon the precise form of words used. The object of each of the two guarantors was to obtain a co-surety, from whom, in the event of his having to pay, he should be able to obtain contribution, a result which would be just as well attained if the contract were joint and several as if it were joint; while it would have been a positive disadvantage to the plaintiff that it should be treated as joint rather than as joint and several. The presumption is that the parties intended it to be joint and several. But if so, then it is clear that the doctrine of *Kendall* v. *Hamilton* (4) has no application. But secondly, even if the contract here was a joint one, still *Kendall* v. *Hamilton* (4) does not apply, for the cause of action now sued on is not the same as that on which judgment was recovered against the defendant's joint contractor. A cheque and its consideration constitute distinct causes of action, and judgment on one is no bar to an action on the other; though no doubt if separate actions were brought against

(1) 3 Taunt. 130.
(2) 19 Q. B. D. 229, at p. 233.
(3) 13 M. & W. 494.
(4) 4 App. Cas. 504.
(5) 19 Q. B. D. 229.
(6) 15 C. B. 145.

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the same person for the two causes the Court would in general stay the second action as vexatious. In the case of *Drake* v. *Mitchell* (1), where one of three joint covenantors gave a bill of exchange for a debt secured by the covenant, and judgment was recovered on the bill, it was held by Lord Ellenborough and the full Court of King's Bench, that such judgment whilst unsatisfied was no bar to an action of covenant against the three. That case is in direct conflict with *Cambefort* v. *Chapman* (2), and the grounds on which the judges in the later case sought to distinguish it are insufficient. The earlier decision is to be preferred. The case of *Buckland* v. *Johnson* (3) is not in point. That turned on the obligation of a plaintiff, who had two alternative and inconsistent remedies, to elect between them. Here the remedies on the guarantee and on the cheque are consistent and concurrent, and the doctrine of election has no application.

Cur. adv. vult.

April 14. WILLS, J. I wish, in the first place, to express my thanks to the learned counsel on both sides for singularly able and useful arguments. This is an action brought upon a document, dated January 27, 1890, addressed to the plaintiff's agents and signed by the defendant, in these words: "I hereby agree to become joint security with Mr. John Thomas for the payment of the rent" of a certain farm "by Mr. Thomas Williams." Mr. John Thomas had, on January 23, signed a document by which he undertook, in identical terms, to become joint security with the defendant. I think that the proper construction of those two documents is, that taken together they operate as a joint guarantee by Thomas and the defendant. Neither had any operation until both were signed—and there was then the written and signed promise by each to be security jointly with the other. The plaintiff now brings his action against the defendant to enforce that guarantee. The defendant has no defence on the merits, but relies on the technical defence that his joint guarantor Thomas, having been applied to to pay the half-year's

(1) 3 East, 251. (2) 19 Q. B. D. 229.
(3) 15 C. B. 145.

rent for which they were jointly liable, gave his cheque for the amount, that he did not pay it, that he was sued upon it, and that judgment was recovered against him. It is not suggested that that judgment has been satisfied, but it is said that the judgment was substantially for the same cause of action as that for which the present action is brought, and that upon the principle of *King* v. *Hoare* (1), and *Kendall* v. *Hamilton* (2), the remedy against his co-guarantor upon the guarantee being merged in the judgment and gone, the remedy against himself is also gone. The case turns wholly upon the question whether the judgment upon the cheque, which was accepted in the ordinary way as conditional payment only, and not by way of accord and satisfaction, operated as a merger of Thomas' liability upon the guarantee. I am of opinion that it did not. I agree that if Thomas had been a sole guarantor, and if, after judgment recovered against him on the cheque a second action had been brought against him on the guarantee, the Court would have stayed the second action as useless and vexatious. But under the circumstances of this case, if the present defendant were to insist on having Thomas joined as a co-defendant, I do not think that any Court would stay the action. For while refusing to do so they might do ample justice to Thomas in the way of protecting him from a double execution, and from unnecessary costs, and by their refusal they would prevent injustice being done to the plaintiff by the discharge of the defendant from a liability which is honestly his.

The case of *Drake* v. *Mitchell* (3), which was relied on by the plaintiff, seems to me to entirely cover the present case, and it would be conclusive in the plaintiff's favour were it not for the difficulty created by the later case of *Cambefort* v. *Chapman* (4), which seems to me to be equally undistinguishable from this case. Those two decisions are in my judgment irreconcileable, and I cannot regard as tenable the grounds upon which the judges in the later case endeavoured to distinguish the earlier. Under those circumstances I feel myself bound to follow the earlier decision, which was given as long ago as 1803, and has

(1) 13 M. & W. 494.
(2) 4 App. Cas. 504.
(3) 3 East, 251.
(4) 19 Q. B. D. 229.

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been treated as law without disapproval down to 1887, when *Cambefort* v. *Chapman* (1) was decided. Field, J., there attempted to distinguish *Drake* v. *Mitchell* (2) upon the ground that "the decision proceeded on the technical rule that the giving of a bill of exchange could not suspend the remedy on the covenant, which was a security of a higher nature" (at p. 232). I have read *Drake* v. *Mitchell* (2) carefully, and I confess I cannot see that the judgment proceeded upon any such ground. What was urged there in the argument for the plaintiff was, that the giving of the bill of exchange did not of itself merge the cause of action on the covenant. But that is no ground for distinguishing *Cambefort* v. *Chapman* (1); for neither does the giving of a bill in respect of a simple contract debt merge the cause of action for the original debt. It may suspend the cause of action for a time, but it does not operate as a merger. Field, J., then goes on to say, "The only question here is whether the bills and the consideration for them can be treated as giving two separate and distinct causes of action; but to do so would be inequitable, and if we were to hold that they could be so treated, we should be deciding in opposition to the decision in *Bridges* v. *Berry*." (3) There again after careful examination of the case of *Bridges* v. *Berry* (3), I must express my dissent from the interpretation which Field, J., puts upon it. That was an action brought upon two bills of exchange, one for 119*l.* drawn on July 17, at three months' date, upon the defendant and accepted by him, and the other for 117*l.* drawn on October 26 by the defendant on one Ivory, and payable to the defendant's order. On dishonour of the first bill the defendant indorsed the second bill of which he was the drawer to the plaintiff by way of conditional payment of the first. The second bill on presentment was also dishonoured, but the plaintiff neglected to give the defendant notice of such dishonour. It was held that by such neglect the plaintiff had discharged the defendant from his liability upon the first bill as well as upon the second. But the ratio decidendi is, that by the plaintiff's neglect the defendant's position had been altered to his damage, inasmuch as he had been thereby deprived

(1) 19 Q. B. D. 229. (2) 3 East, 251.
(3) 3 Taunt. 130.

of the opportunity of withdrawing from the acceptor's hands the effects which he had presumably lodged with him for the purpose of meeting the bill. That is the explanation of the case given in Byles on Bills, 15th ed., p. 239. It certainly did not decide that a recovery of judgment upon the second bill would have been a bar to an action upon the first. Manisty, J., in his judgment in *Cambefort* v. *Chapman* (1), does not seem quite satisfied with the grounds upon which Field, J., distinguishes *Drake* v. *Mitchell* (2), and adds another which he regards as a more substantial ground, namely, that the bill in *Drake* v. *Mitchell* (2) was given as a collateral security. But that ground for distinguishing the two cases seems to me equally to fail, for I cannot understand how the bill was more a collateral security in the one case than in the other.

Mr. Bankes relied on a passage in Byles on Bills to the effect that "judgment recovered on a bill or note is an extinguishment of the original debt, as between the plaintiff and the defendant." If that expression "original debt" is to be understood as referring to the debt which constituted the consideration for which the bill was given, the authorities cited by the learned author in support of his proposition do not seem in any way to support it. I cannot help thinking that what he meant when speaking of the original debt was not the consideration for the bill, but the cause of action on the bill itself. With regard to the case of *Buckland* v. *Johnson* (3), I may say that I do not think it has any bearing upon the present question. That was a case where, the plaintiff's goods having been wrongfully sold by a firm of auctioneers, the plaintiff had an election whether he would sue in tort for the conversion or waive the tort and sue for money had and received. He adopted the former alternative and recovered judgment for 100*l.* damages for the conversion. He subsequently found that the amount actually produced by the sale was 150*l.*, and he then sought to recover the difference between the two sums as money had and received to his use. But it was held that, having once made his election between two remedies which were mutually exclusive, he was bound by that election, and could not afterwards change his mind. In the present case, however, there is no

(1) 19 Q. B. D. 229. (2) 3 East, 251.
(3) 15 C. B. 145.

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question of election, for the remedies here are not mutually exclusive, but concurrent. It has long been common practice in actions by a drawer of a bill against acceptor to join a claim on the consideration with the claim on the bill, but no one ever heard of the plaintiff in such a case being put to his election whether he would proceed upon the one claim or upon the other.

I come, therefore, to the conclusion that the present defence is not maintainable, and that there must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for plaintiff: *Woodcock, Ryland, & Parker, for E. M. Underwood, Hereford.*

Solicitors for defendant: *Wrentmore & Sons, for Morgan, Rhys, & Bruce, Pontypridd.*

J. F. C.

1894 *April* 13.

HEATH AND OTHERS *v.* THE OVERSEERS OF THE POOR OF THE TOWNSHIP OF WEAVERHAM.

Highway—Exemption from Highway Rate—Liability to repair ratione tenuræ —Alteration of Highway—Estoppel—Res judicata—Facts not before Court on previous occasion—Highway Act, 1835 (5 & 6 *Wm.* 4, c. 50), s. 33.

The appellants had from time immemorial repaired a certain highway ratione tenuræ, and had in consequence been exempt from contributing to the repair of other highways in the district. In 1782 the highway was placed under the control of turnpike trustees, who materially altered its nature and course; but on the expiration of the turnpike trust in 1862 the appellants, believing that they were still liable to do so, continued to repair the highway. In 1866 the Court of Queen's Bench decided (Law Rep. 1 Q. B. 218) that the appellants were not liable to be rated for the repair of highways in the district; but the fact of the alteration of the highway by the turnpike trustees was not brought to the attention of the Court. In 1892 the highway was declared a main road, and the appellants thereupon ceased to repair it. The question having arisen whether they were liable to contribute to a rate for the repair of the highways in the district:—

Held, that their exemption from such a rate depended on their liability to repair the highway ratione tenuræ, and that both had come to an end on the alteration of the highway by the turnpike trustees; and, further, that the former decision of the Queen's Bench did not make the matter res judicata, since the material fact of the alteration of the highway had not been brought to the attention of the Court.

CASE stated by consent and by order of a judge, pursuant to 12 & 13 Vict. c. 45, s. 11.

The appellants were the owners and occupiers of a mansion-house, farms, and lands known as Hefferston Grange, situate in the hamlet of Gorstage, within the township of Weaverham, which township was a place separately maintaining its own poor. From time immemorial the owners and occupiers of Hefferston Grange had been liable to repair, and had repaired at their sole expense, a road or highway known as Grange Lane, in the hamlet of Gorstage, and had in consequence of such liability been exempt from repairing or contributing to the repairs of the other highways in the hamlet of Gorstage. The hamlet of Gorstage from time immemorial had maintained its own highways separately from the rest of the township of Weaverham. The occupiers of Hefferston Grange had always been rated in respect of the same to the relief of the poor of the township of Weaverham. By 22 Geo. 3, c. cvi., Grange Lane and certain other roads in the district were constituted a turnpike road, and trustees were appointed for amending and keeping it in repair, and by a subsequent Act, the provisions of the General Turnpike Act (3 Geo. 4, c. 126) were incorporated with the said Act.

During the continuance of these Acts the trustees altered Grange Lane to a considerable extent by widening, taking up paving-stones, stopping and diverting portions of it, and making it into a macadamized road.

In 1862 the turnpike trust expired, and the appellants resumed repairing Grange Lane, and continued to repair it down to 1892. In 1863 a highway district was formed under 25 & 26 Vict. c. 61 for the township of Weaverham and some other places, and since then no separate highway rate had been made for the hamlet of Gorstage; but the highways therein had been repaired by the highway board at the expense of the township of Weaverham, exclusive of Hefferston Grange. In 1864 the appellants appealed to quarter sessions against a poor-rate made on them as occupiers of Hefferston Grange by the overseers of the township of Weaverham, which rate was made for the purpose (inter alia) of enabling the overseers to pay to the highway board of the district certain moneys required by the board for repairing the highways in the township of Weaverham, including the hamlet of Gorstage. The Court of quarter sessions

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confirmed the rate, but stated a case for the opinion of the Court of Queen's Bench. That Court quashed the order of sessions, and ordered the rate to be amended by reducing the assessment upon the appellants to the amount required by the overseers for purposes other than that of paying the money to the highway board. (1)

In 1890 the appellants applied to the county council to declare Grange Lane to be a main road, and they then contended that in consequence of the turnpike trustees having widened and diverted Grange Lane and altered the character of it, they (the appellants) were no longer liable to repair such road.

In 1892 the county council declared Grange Lane to be a main road, and the appellants thereupon ceased to repair it.

In May, 1893, the overseers of the township of Weaverham made, and the justices allowed, a rate of 1*s.* in the pound upon each occupier in the township, including the appellants. Of this rate 3*d.* in the pound was the portion required by the highway board of the district from the township for the expense of repairing the highways in the township, including those in the hamlet of Gorstage.

The appellants appealed to quarter sessions against the rate, and this case was stated for the opinion of the Court.

Poland, Q.C., and *Alexander Glen*, for the appellants. Under s. 33 of the Highway Act, 1835, the appellants, who were bound to repair Grange Lane ratione tenuræ, were exempted from liability to highway rate. That liability is perpetual, and the fact that they have now ceased to repair Grange Lane does not destroy the exemption. Grange Lane has now been declared to be a main road under the Highways and Locomotives Act, 1878 (41 & 42 Vict. c. 77), s. 15; but there is power under s. 16 to reduce it to an ordinary highway again, and in that case the liability of the appellants to repair it would revive. The entire maintenance of main roads while they continue to be main roads is transferred to the county council by s. 11 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), and by s. 97, "Nothing in this Act with respect to main roads shall alter the

(1) See Law Rep. 1 Q. B. 218.

liability of any person or body of persons corporate or unincorporate not being a highway authority to maintain and repair any road or part of a road." That, therefore, expressly preserves the liability of the appellants to repair Grange Lane ratione tenuræ.

Secondly, the point has already been decided in *Reg.* v. *Heath* (1), which arose between the same parties, and in which the question was the same. The Court there decided that the appellants were exempted from liability to highway rate, and the question cannot now be reopened: *Rex* v. *Wick St. Lawrence* (2); *Reg.* v. *Hutchings.* (3)

Marshall, Q.C., and *Honoratus Lloyd*, for the respondents. The liability of the appellants to repair Grange Lane ceased upon its alteration by the turnpike trustees, as appears from *Reg.* v. *Barker* (4), which is merely declaratory of the law. The fact that the appellants continued after that alteration to repair Grange Lane did not make them liable to do so, and the exemption from highway rate depends on the liability to repair: *Freeman* v. *Read* (5); *Reg.* v. *Freeman* (6); *Reg.* v. *Rollett.* (7)

Secondly, *Reg.* v. *Heath* (1) does not operate as an estoppel. The principle of that decision was that the appellants were still liable to repair ratione tenuræ, and the point that such liability had been destroyed by the alterations in Grange Lane was not taken in that case. The decision could only operate as an estoppel if the rate were the same, as is pointed out by Lord Selborne in *Reg.* v. *Hutchings.* (8)

Poland, Q.C., replied.

CHARLES, J. In this case the question for the opinion of the Court is whether the appellants are or are not liable to be rated by the respondents in respect of their premises, for raising contributions required by the highway board towards the expense of repairing highways in the township of Weaverham. It appears

(1) Law Rep. 1 Q. B. 218.
(2) 5 B. & Ad. 526.
(3) 6 Q. B. D. 300.
(4) 25 Q. B. D. 213.
(5) 4 B. & S. 174.
(6) 7 W. R. 556; 33 L. T. (O.S.) 220.
(7) Law Rep. 10 Q. B. 469.
(8) 6 Q. B. D. 300, at p. 306.

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Charles, J.

that the appellants were the owners and occupiers of certain premises known as Hefferston Grange, and no doubt were at one time liable ratione tenuræ to repair, and did in fact repair, a certain road known as Grange Lane, in the hamlet of Gorstage, in the township of Weaverham. It is further clear that this liability to repair Grange Lane no longer exists. An Act was passed in 1782 which enabled turnpike trustees to widen, divert, or alter Grange Lane; and before the year 1862 that road had been so altered in character that, according to the decision in *Reg.* v. *Barker* (1), the legal liability of the appellants to repair it ratione tenuræ had come to an end; and though, in fact, they did continue to repair it for some time, they have now ceased to do so.

The first question that arises is this: Are the appellants exempt from a general highway rate, inasmuch as they were once exempt from it, as being liable to repair this particular road ratione tenuræ? That question seems to me to turn on s. 33 of the Highway Act of 1835. Since 1862, when the turnpike trust ceased, there has been nothing to modify or alter the exemption conferred on the appellants by that section.

The section runs thus: "When property, or the owner or occupier in respect thereof, has, previous to the passing of this Act, been legally exempt from the performance of statute duty, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the payment of the rate hereby imposed." Now, what is the meaning of the words "legally exempt"? Clearly the exemption must be a legal one; and it has been decided that, although the mere omission to rate premises is not sufficient evidence of exemption, yet the circumstance that the occupiers have always repaired a particular road is enough to establish a "legal" exemption: see *Great Western Ry. Co.* v. *Denchworth* (2); *Reg.* v. *Freeman* (3); *Freeman* v. *Read.* (4) And in this case, inasmuch as it was proved that the appellants prior to the Highway Act, 1835, did repair and were liable ratione tenuræ to repair this road, there is no doubt that the premises

(1) 25 Q. B. D. 213.
(2) 25 J. P. 342.
(3) 7 W. R. 556.
(4) 4 B. & S. 174.

were prior to that date "legally exempt." It is contended that the exemption continues to exist, and that nothing can destroy the privilege given by the section. I do not think that this is so. The question depends, as I have said, on the true construction of the section. The words in the last clause, "the said property," are worthy of notice. They mean, as is seen by the earlier part of the clause, "property legally exempt" from liability for highway rates, and the meaning of the section seems to me to be that property is exempt from liability only so long as it is legally exempt. When the legal ground for exemption ceases it is no longer to be exempt. To take an analogous case, let us suppose that there is a chapel which, of course, is legally exempt from the payment of highway rates. If that chapel is in process of time turned into a dwelling-house or a shop, it surely would not be contended that it was still entitled to exemption. So in this case, the legal reason for exemption—the liability of the owner and occupiers of Hefferston Grange to repair Grange Lane ratione tenuræ—having come to an end in consequence of the alteration in Grange Lane and the decision in *Reg.* v. *Barker* (1), then exemption from liability to highway rate has also ceased. "Cessante ratione legis, cessat ipsa lex"; and I think this case is an illustration of that maxim. The reason for the exemption having disappeared, the exemption has disappeared also.

But then it is contended that the question has already been decided in *Reg.* v. *Heath* (2), which was a case arising between the same parties, and it is said that the point of that decision was the same, and that the matter is therefore res judicata. In order to discover whether that is really so, it is necessary to examine the decision in that case and to see on what materials it was given. The decision itself was that the Highway Act of 1862, which created highway districts, did not alter the liability to highway maintenance. Lush, J. (in delivering the judgment of the Court), there says that there is nothing in the Act of 1862 inconsistent with the provision for exemption contained in the Highway Act of 1835. That is to say, the decision is that in 1866 matters still remained with regard to Hefferston Grange

(1) 25 Q. B. D. 213. (2) Law Rep. 1 Q. B. 218.

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Charles, J.

and its liability to repair Grange Lane as they were in 1835. It is clear that the question was argued, whether rightly or wrongly, on the assumption that the owner and occupiers of Hefferston Grange were still liable to repair Grange Lane ratione tenuræ. The decision in *Reg.* v. *Barker* (1) shews that this assumption was wrong, since the alteration in the road had destroyed the liability to repair ratione tenuræ. Nevertheless, as a fact, the appellants, after the expiration of the turnpike trust, resumed their liability ratione tenuræ to repair the lane, and continued to repair it, and in 1866 they appeared to be actually doing what it was supposed they were bound to do, and the Court in *Reg.* v. *Heath* (2) assumed that the legal duty to repair and the consequent exemption from highway rate still existed. Now can it be said that that decision makes the matter res judicata? I cannot think so. Surely it cannot prevent us from inquiring into matters which have since arisen. *Reg.* v. *Heath* (2) was only decided in reference to the state of things which was then assumed to exist, and since we now know that the liability to repair Grange Lane ratione tenuræ had ceased, I think that we are bound to take cognizance of that fact. Therefore, in my opinion, the matter is not res judicata, and it seems to me that s. 33 of the Highway Act, 1835, does not apply so as to exempt the appellants from highway rate. The appeal must be dismissed.

COLLINS, J. I am of the same opinion. The question turns on s. 33 of the Highway Act, 1835. The immunity from highway rates which is claimed by the appellants is claimed, first, by virtue of that Act, and, secondly, on the ground of estoppel. Mr. Poland contends, first, that on the true construction of s. 33 the immunity there given is continuous, and, secondly, that in a case decided in 1866 between the same parties it was held, with regard to the same subject-matter, that the appellants were exempt from highway rate, and therefore that the matter cannot be raised again. As to s. 33, it is clear law that when a person at the date of that Act was liable ratione tenuræ to repair a road, and was on that account relieved from highway rates, he

(1) 25 Q. B. D. 213. (2) Law Rep. 1 Q. B. 218.

continued to be so under the Act. That was the law in 1835, and the Highway Act of that year by s. 33 preserved all existing immunities and exemptions. The words of that section are most comprehensive, and it is the only section dealing with the matter. When we take a specific case, and regard the "property" mentioned in the section as "property liable to repair a road ratione tenuræ," it is clear that the "said property" in the latter part of the section refers only to such property, and reading the section in this way it is obvious that it is only while the property is subject to the liability ratione tenuræ that it can claim the exemption given by the section. When that liability ceases, I think that, by virtue of the section, automatically the exemption ceases also. It is shewn in this case that the liability to repair ratione tenuræ did exist at the time of the passing of the Act of 1835, and therefore it came within the exemption of s. 33; but since that time the liability has ceased, and the exemption also has come to an end, since it is no longer within the ambit of the general words defining the property to which alone the exemption is given. It seems to me that this construction is the only possible construction of s. 33, and that to hold that it gave a perpetual exemption in all cases where, at the time of the passing of the Act, property was for some reason exempt, would be to establish an absurdity.

Then it is said that the decision in *Reg.* v. *Heath* (1) prevents us from going into the matter. I do not think so. We are entitled to go behind that decision, and to see on what facts it was given in order to say whether it amounts to an estoppel or not. In that case the facts were that the appellants were actually repairing the road, believing that they were under an obligation to do so ratione tenuræ. On that ground, and in reference to those facts, the Court held the appellants exempted from highway rate, considering that they were within the terms of s. 33, and that nothing in subsequent legislation had affected their position. I do not think that decision precludes us from dealing with the matter in the light of new facts which were not before the Court then, and, taking those facts into consideration, I come to the conclusion that the property in question no longer

(1) Law Rep. 1 Q. B. 218.

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falls within s. 33 as property legally exempt, and therefore that the appellants are wrong.

Appeal dismissed.

Solicitors for appellants: *Rowcliffes, Rawle & Co., for Ashton & Woods, Warrington.*

Solicitors for respondents: *Taylor, Hoare, & Taylor, for A. & J. E. Fletcher, Northwich.*

A. P. P. K.

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April 23.

THE UNITED ALKALI COMPANY, LIMITED *v.* SIMPSON.

Harbours—Obstruction to Navigation—Discharge of Solid Matter in Suspension—54 Geo. 3, c. 159, s. 11.

By 54 Geo. 3, c. 159, s. 11, if the owner or master of any ship or any person working any quarry, mine or pit, "or any other person or persons whatsoever shall cast, throw, empty or unlade" either from such ship or from the shore "any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth" into any port, harbour, or navigable river "so as to tend to the injury or obstruction of the navigation thereof, or in any place or situation on shore where the same shall be liable to be washed into the sea" or into any port, harbour, or navigable river, either by tides, storms, or floods, he shall be liable to a penalty.

The appellants in the course of their business as alkali manufacturers, discharged a large quantity of water containing solid matter in suspension through a drain into a tidal brook which flowed into a navigable river. The solid matter was carried down by the tide and deposited in the river, but it was not alleged or shewn that it tended to the injury or obstruction of the navigation of the river:—

Held, that the appellants were rightly convicted under the latter part of the section.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Widnes in the county of Lancaster, an information was preferred by the respondent on behalf of the acting conservator of the commissioners for the conservancy of the River Mersey against the appellants, charging that they on a certain day "did cast, throw, empty, or cause to be cast, thrown, or emptied, certain rubbish, to wit alkali waste in a place or situation on shore at or near the chemical manufactory works belonging to them . . . where the same was liable to be washed into the River Mersey by tides or floods" contrary to 54 Geo. 3, c. 159, s. 11. (1)

(1) By 54 Geo. 3, c. 159 (an Act for the better regulation of the several ports, harbours, roadsteads, sounds, channels, bays, and navigable rivers in

The appellants carry on the business of alkali manufacturers, and in the course of such manufacture large quantities of refuse or waste, known as alkali waste, are produced, to the extent of many thousand tons in the year. This waste was at one time placed in heaps or mounds on the nearest available space, but it has recently been utilised by a chemical process. Under this process a residue is left in tanks in the form of a liquid containing in suspension solid matter (chiefly consisting of carbonate of lime) in a finely divided state, which is kept in suspension so long as the water is in motion, but when deposited forms a mud.

This residue is discharged from the tanks in the appellants' works through four inch pipes into a sewer, and by means of the sewer is carried into a natural brook at a point about 500 yards above the place where such brook flows into the Mersey. The brook is not the property of the appellants, and is tidal up to and beyond the point where the sewer discharges into it. The solid matter discharged from the tanks in each week would, if dried, have weighed about 567 tons.

It was proved that part of such solid matter was deposited in the brook between the point of the outfall of the sewer and the

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the United Kingdom), s. 11: "And be it further enacted, that if the owner, master, or other person having the charge or command of any private ship of war, transport, or other private or merchant ship or vessel, lighter, barge, boat, or other craft whatsoever, or any person working any quarry, mine, or pit, near to the sea, or to any such harbour, haven, or navigable river as aforesaid, or any other person or persons whatsoever, shall cast, throw, empty, or unlade, or cause or procure to be cast, thrown, emptied, or unladen, either from or out of any such ship or vessel, lighter, barge, boat, or other craft, or from the shore, any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, into any of such ports, roads, roadsteads, harbours, havens, or navigable rivers of this kingdom as aforesaid, so as to tend to the injury or obstruction of the navigation thereof, or in any place or situation on shore where the same shall be liable to be washed into the sea or into any such ports, roads, roadsteads, harbours, havens, or navigable rivers, either by ordinary or high tides, or by storms or land floods, all and every such person or persons so offending, shall for every such offence forfeit and pay a sum not exceeding the sum of 10*l.* over and besides all expenses, which may be incurred in removing to a proper place the said matters which may have been deposited contrary to the provisions of this Act, such expenses to be recoverable in such manner and with such power of commitment on non-payment thereof as in cases of penalties or forfeitures under this Act."

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point where the brook flows into the Mersey. The remainder of such solid matter was proved to be carried down the brook and into the Mersey, either by the tide or by other water flowing down the brook, and part of such solid matter was deposited on the shore of the Mersey near the outfall of the brook between high and low water-marks.

The respondent did not allege or shew that the discharge of such solid matter was such "as to tend to the injury or obstruction of the navigation" of the River Mersey.

The justices convicted the appellants and stated this case for the opinion of the Court.

Joseph Walton, Q.C., and *Deacon*, for the appellants. The conviction was wrong. The appellants are not persons within the meaning of the section. The general words must be taken as applying only to persons ejusdem generis with the classes named immediately before: *Reg.* v. *Cleworth.* (1) The solid matter was not within the terms of the section, nor was it "cast, thrown, or emptied in any place on shore," where it was liable to be washed into the sea, or into any port, &c., within the meaning of the section. Lastly, no offence has been committed against the section unless and until it is shewn that the Act was committed "so as to tend to the injury or obstruction of the navigation" of the river. The object of the Act was to protect navigation, as is shewn by ss. 12 and 13, and those words apply to both parts of this section.

It would be most disastrous to the trade of the country if manufacturers and others were prevented from depositing waste or rubbish in any spot where, by some flood or high tide, it might be washed into the sea, although it might be shewn that it would be impossible for it to injure or obstruct navigation.

Sir Henry James, Q.C., and *T. G. Carver*, for the respondent. The conviction was right.

[LORD COLERIDGE, C.J. We need not trouble you to argue any point but the last.]

The original statute on the subject was 19 Geo. 2, c. 22, s. 7, of which dealt with obstructions to ports and navigable rivers.

(1) 4 B. & S. 927.

The Act of George III. stated that that Act had not been found adequate, and that further provisions ought to be made. The Act of George III., therefore, intentionally goes much further than the former Act. Sect. 11 deals with two offences (1.) the casting of rubbish, &c., into the sea, so as to tend to obstruct navigation; (2.) the placing of rubbish, &c., in such a position that it may be washed into the sea. In the second case the offence is complete when the rubbish, &c., is deposited, and the question, whether or not it may obstruct navigation, cannot arise. It may never reach the sea or the navigable river, and even if it does, it may not obstruct navigation; but the Legislature has said that it shall not be deposited in such a place that it may be washed into the sea. The construction of the section plainly shews that the words "so as to tend to the injury or obstruction of the navigation" only apply to the first part and not to the second part of the section.

LORD COLERIDGE, C.J. In this case a very important question is raised before us, on a case stated by justices, as to whether the state of things produced by the appellants, the United Alkali Company, is or is not within the scope of the Act 54 Geo. 3, c. 159, and whether the justices were right in convicting the appellants under s. 11 of that Act.

It is necessary just to mention at the outset that the Act 54 Geo. 3, c. 159, is an expansion of, and carries further in many respects an Act of 19 Geo. 2, c. 22. Both Acts, however, deal with the same kind of offences, and the offences dealt with are, as is pointed out, those affecting the navigation of seaports or navigable rivers, by means of obstructions thrown in either from ships, such as ballast, or from the shore, as in the case of the waste of mines or similar matter. It is said that the particular acts of the appellants, with which we have now to deal, fall within the Act of George III. That Act, as I have said, goes far beyond the Act of George II. in its provisions, and recites that the former Act being found insufficient, it had become desirable to increase the strength of legislation on the subject. Without going through the many instances to be found throughout the later Act, in which it exceeds the powers of the Act of

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George II., I will only say that the Act of George III. deals with several other matters, and is more stringent in its provisions than the Act of George II.

Confining myself, therefore, to s. 11 of the 54 Geo. 3, c. 159, I find that it enacts, "That if the owner, master, or other person having the charge or command of any private ship of war, transport, or other private or merchant ship or vessel, lighter, barge, boat, or other craft whatsoever, or any person working any quarry, mine, or pit near to the sea, or to any such harbour, haven, or navigable river as aforesaid, or any other person or persons whatsoever shall cast, throw, empty, or unlade, or cause or procure to be cast, thrown, emptied, or unladen, either from or out of any such ship or vessel, lighter, barge, boat, or other craft, or from the shore, any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, into any of such ports, roads, roadsteads, harbours, havens, or navigable rivers of this kingdom as aforesaid, so as to tend to the injury or obstruction of the navigation thereof." (We must notice that the words "so as to tend to the injury or obstruction of the navigation thereof" come in at the end of what has been called the first part of the section. Then comes the second part of the section, under which this conviction, if it is to be supported at all, must be supported), "or in any place or situation on shore where the same shall be liable to be washed into the sea, or into any such ports, roads, roadsteads, harbours, havens, or navigable rivers, either by ordinary or high tides, or by storms or land floods, all and every such person or persons so offending shall for every such offence forfeit and pay a sum not exceeding 10*l.*" It is to be observed that, dividing the section thus into two parts, the words as to tending to the injury or obstruction of the navigation, do not occur in the second part. It is probable that their exclusion from the second part of the section was intentional, because it would have been perfectly easy to put the two portions of the section together, and to place the words "so as to tend to the injury or obstruction of the navigation" at the end. Therefore, from the ease with which that might have been done, and with which the words as to tending to injure and obstruct the navigation, might have been made applicable to both offences created

by the section, the fair and true presumption seems to me to be that the words were intended to apply to the first part of the section, and to that alone. Now, with the first part of the section we have nothing to do to-day. The question for us is whether we ought to read these words about tending to injure and obstruct navigation into the second part of the section. In my opinion, this conviction can be supported, and the fact that the words are left out where they could easily have been put in, either by remodelling the section, as I have suggested, or by repeating the words, shew that they were intentionally omitted from the second part of the section, and that, in considering the offence there created, it is not necessary to have regard to any tendency to injure or obstruct navigation. This seems to me to be the plain and reasonable construction of the Act of Parliament, and where that is so I am always extremely reluctant to read the words of an Act in any but their usual or ordinary sense. Of course, where such a construction would lead to a manifest absurdity, it may become our duty to read into an Act of Parliament words which are not there in fact. Is there any such absurdity here if the words are construed in their ordinary and natural sense, which would force us to import into the latter part of this section words which are not actually in it? I do not think so. There is a clear distinction between the offences contemplated by the two parts of the section. In the first part, it is clear that the offence contemplated is the act of the offending party alone. The obstruction, if such there be, to navigation is the actual and direct result of an act of the party himself. The second part, no doubt, also makes the act of the offending party an offence, but it is an act which cannot of itself in any way injure or obstruct navigation. Imagine, for instance, that a man places a large block of granite near the sea. It is obvious that of itself his act may never injure or obstruct, or tend to injure or obstruct, navigation. If there be no high tide, no flood, nor any force of nature which takes the granite into the sea, then there is no injury to navigation at all. But if the obstacle, whatever it may be, is placed in such a position that through the intervention of some of the forces of nature, it may be taken into the sea or into a navigable river, and thus obstruct navigation, then I think it

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is the clear intention of the section to prevent that from being possible, and to say that the mere placing of it in such a position, although in itself no injury to navigation, is an offence against the Act. As I read the section, it says that you shall not by any act of yours obstruct the navigation of these seaports and navigable rivers. That is the first part; then it goes on: neither shall you do what will make such an obstruction or injury to navigation more easy or more likely. There seems to me to be a very good reason for the distinction between the first and second parts of the section. In the case of the offence dealt with in the first part of the section, directly the act is over the tendency to obstruct or not to obstruct navigation is at once apparent. In the case of the offence dealt with in the second part, the tendency to obstruct navigation cannot in rerum naturâ exist when the act takes place; it could only be ascertained when, by some force of nature, the matter deposited on the shore was washed into the sea. Therefore, the question of the tendency to obstruct, is not material in regard to the offence created by the second part of the section, and the conviction must, I think, be upheld.

Some other points were taken for the appellants which we disposed of in the course of the argument and which I only mention now to shew that I have not forgotten them. It was urged that the appellants did not come within the words of the section "as any other person or persons whatsoever." In my opinion they are well within those words, even limiting them, as I think they ought to be limited, to persons ejusdem generis with those who are mentioned before in the section. Then it was said that the matter discharged from the appellants' works was not "earth, rubbish, or filth" within the meaning of the section. As to that also I am against the appellants. Then it was said that the acts of the appellants did not amount to a casting, throwing, or emptying of their material on shore. That also we decide in favour of the respondents.

There is only one other point to which I need advert. We are dealing with an Act of Parliament passed in 1814, and I cannot doubt that at any rate some of the dangers to industries and manufactories, which have been pointed out by Mr. Walton,

were present to the mind of the legislature then. But if law does not grow, public feeling and public sense do grow; and it seems to me in the highest degree improbable that any public body which may have to enforce this Act would use it so unreasonably as to prevent even the smallest deposit of rubbish from any manufactory, because it might by some flood or high tide be carried into the sea. It is always possible to name an extreme case in which the law if put into force would press unduly; but the Act has to be put into force by men of practical common sense, and I do not think that it is likely to be abused. Nor can it be necessary in many cases for the deposits of rubbish or other material from a manufactory to be made so near the sea or a navigable river that it is even possible for it to be washed into the sea or into a navigable river by high tides or floods. For these reasons I am of opinion that the appellants fail, and that the conviction must be upheld.

WRIGHT, J. I do not feel sufficient confidence in my own opinion to differ from my Lord, and I therefore will only say that it seems to me that the section can only apply to deposits of rubbish of such a kind and quantity, and in such a place that if they were washed into the sea or a navigable river they would tend to injure or obstruct navigation. I think that there must be some limit of that kind.

KENNEDY, J. I agree with my Lord for the reasons which he has given, to which I have very little to add. It seems to me that, according to the plain English of the enactment, it can only be construed in one way, and that there is nothing in it so repugnant to sense as to force us to construe it in any other way. It is worthy of notice that, in addition to the penalty of 10*l.* imposed by the section, the person or persons so offending may be ordered to pay "all expenses which may be incurred in removing to a proper place the said matters which may have been deposited contrary to the provisions of this Act." The "matters deposited" must refer to a deposit on land. How is it possible to prove that such a deposit tends to injure or obstruct navigation when it is clearly contemplated that it shall be

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removed to a proper place before it has the opportunity of so doing? That, I think, clearly shews that the tendency to obstruct navigation does not enter into the composition of the offence dealt with in the latter part of the section. I think that if the material is deposited in such a place that it is liable to be washed into the sea or a navigable river, the second part of the section has been violated.

LORD COLERIDGE, C.J. I wish to add that I do not at all differ from the qualification suggested by my brother Wright. It seems to me that in construing the Act some such limitation must be understood.

Appeal dismissed.

Solicitors for appellants: *Wynne, Holmes, & Wynne, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for A. T. Squarey, Liverpool.*

A. P. P. K.

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April 13, 14.

THE QUEEN *v.* MEAD AND ANOTHER.

Metropolis—Public Health Act—Nuisance—Summary Jurisdiction—Procedure where Owner of Premises is not known or cannot be found—Summons, Form of—Service—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 128.

Where a complaint to a petty sessional court is made by a sanitary authority under the Public Health (London) Act, 1891, alleging that a nuisance exists on premises caused by the act, default, or sufferance of the owner, a summons to answer the matter of such complaint is good in form, though it be addressed to the "owner" of the premises (describing them) merely, without further name or description.

Such a summons is a "document" within the meaning of the words "notice, order, or other document" in s. 128 of the Public Health (London) Act, 1891, and may therefore be properly served by delivering it to some person on the premises.

RULE calling upon one of the metropolitan police magistrates to shew cause why he should not proceed to hear and determine the matter of a complaint.

In February, 1894, a summons was issued, upon the complaint of the sanitary inspector of the board of works for the Poplar

district, against the owner of premises, 15, Swaton Road, in the parish of Bromley St. Leonard.

The complaint alleged that a nuisance existed on those premises caused by the act, default, or sufferance of the owner thereof, and the proceedings were taken under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). The name of the defendant did not appear on the summons, which was addressed to "the owner of the premises known as 15, Swaton Road, in the parish of Bromley St. Leonard, in the county of London and within the metropolitan police district." When the summons came on to be heard before the magistrate, the only evidence given was that of a police constable, who was called to prove the service of the summons, and who stated that he gave it to a woman serving in the shop at 15, Swaton Road; that he did not know whether she was the tenant, or the tenant's wife, or whether the summons had ever reached the owner of the premises, and that he did not read the summons to the woman, or shew her the original. A solicitor appeared for the complainant, and admitted that, so far as he and the complainant were aware, the woman to whom the summons was delivered was not the owner of the premises, and that 15, Swaton Road was not the last or most usual place of abode of the owner. There was no evidence before the magistrate as to who the owner was, or that the summons had ever reached him or come to his knowledge. No one appeared for the defendant.

The magistrate was of opinion that the summons was not a "notice, order, or other document" within the meaning of s. 128 of the Public Health (London) Act, 1891 (1), and that it had not

(1) By s. 127, sub-s. 1, of the Public Health (London) Act, 1891: "Notices, orders, and other such documents under this Act shall be in writing; and notices and documents other than orders, when issued by a county council or a sanitary authority, shall be sufficiently authenticated if signed by their clerk or by the officer by whom the same are given or served."

Sub-s. 2: "Orders shall be under the seal of the council or authority duly authenticated."

Sect. 128, sub-s. 1: "Any notice, order, or other document required or authorized to be served under this Act may be served by delivering the same or a true copy thereof either to or at the usual or last known residence in England of the person to whom it is addressed, or, where addressed to

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been properly served. He was also of opinion that the summons ought to have been addressed to the defendant by name. On these grounds he refused to hear the matter of the complaint, and dismissed the summons. This rule was thereupon obtained by counsel on behalf of the complainant.

H. Sutton, shewed cause. The magistrate was right in holding that he had no jurisdiction to hear and determine the matter of the complaint. First, the summons was bad in form; it should have been addressed to the owner of the premises by name, according to the form of summons given in Jervis's Act (11 & 12 Vict. c. 43). By s. 117, sub-s. 1, of the Public Health (London) Act, 1891, "all offences, fines, penalties, forfeitures, costs and expenses under this Act, or any by-law made under this Act, directed to be prosecuted or recovered in a summary manner, or the prosecution or recovery of which is not otherwise provided for, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts." It is true that a form of summons, which may be addressed either to a named person, or to the "owner" or "occupier" of the premises without naming him, is given in the third schedule (Form B), but that form was probably put there by mistake. Next, assuming that the summons was good in form, the service of it was bad; it should have been served under s. 1 of Jervis's Act, "by delivering the same to the party personally, or by leaving the same with some person for him at his last or most usual place of abode." The Act of 1891, except by the reference in s. 117 to the Summary Jurisdiction Acts, contains no provision for the service of a summons, which is not a "notice, order, or document" within the meaning of ss. 127, 128, and is not authorized to be served under the Act. Sub-s. 3 of s. 128 shews that a "notice" is the only document which may be given to or served

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the owner or occupier of premises, then to some person on the premises. . . ."

Sub-s. 3: "Any notice by this Act required to be given to or served on the owner or occupier of any premises may be addressed by the description of the "owner" or "occupier" of the premises (naming them) in respect of which the notice is given or served, without further name or description."

on the owner or occupier, where it is addressed to him as such without further name or description. The documents mentioned both in ss. 127 and 128 are intended to be documents issued by the sanitary authority or by the county council. The Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), which is repealed by the Public Health (London) Act, 1891, provided, by s. 31, that "notices, summonses, and orders" under that section might be served by delivering them to or at the residences of the persons to whom they were addressed, or by delivering the same to some person upon the premises. In s. 128, sub-s. 1, of the Act of 1891 "summons" has been left out advisedly. If the opposite view of the construction of the statute were adopted, a person might be made liable to penal consequences under the Summary Jurisdiction Acts in his absence, and without having had the opportunity of being heard in his defence. A construction involving such a result ought not to be adopted. The inconvenience to local authorities which, it may be suggested, will result from a decision that the summons ought to be issued and served under Jervis's Act, is likely to arise in very few instances, because express provisions for discovering the name and address of the owner are contained in s. 116, sub-s. 3, of the Act of 1891. If the occupier refuses or wilfully omits to give the owner's name and address, or wilfully misstates the same, he is made liable to a fine.

R. D. Muir, for the complainant, in support of the rule. The object of the Public Health (London) Act, 1891, is to provide a summary and prompt procedure for the abatement of nuisances. By sub-s. 1 (*a*) of s. 2, "any premises in such a state as to be a nuisance or injurious or dangerous to health" shall be a nuisance liable to be dealt with summarily under the Act. Sect. 3 provides that where information of the existence of a nuisance is given to the sanitary authority, a written intimation of the existence of such nuisance shall be given by the officers of the authority to the person who may be required to abate it. By s. 4, sub-s. 1, the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the

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nuisance arises, requiring him to abate the same within the time specified in the notice. By sub-s. 3 (*a*), where the nuisance arises from any want or defect of a structural character, or where the premises are unoccupied, the notice shall be served on the owner. By s. 141, "owner" means the person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent. By s. 5, sub-s. 1, if the person on whom the notice to abate has been served makes default in complying with the requisitions thereof within the time specified, the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make a "nuisance order" on such person, and, if he fails to comply with the provisions of the nuisance order, he is liable (sub-s. 9) to be fined, as therein specified. That complaint must be brought before the petty sessional court on a summons, and, by s. 8, whenever it appears to the petty sessional court that the person by whose act, default, or sufferance the nuisance arises, or the owner or occupier of the premises, is not known or cannot be found, then the nuisance order may be addressed to, and if so addressed shall be executed by, the sanitary authority. The petty sessional court may, therefore, deal with the matter of the complaint in the absence of the owner, and it follows that the summons may be served where the owner is not known or cannot be found. It is obvious that in many cases great difficulty is found in ascertaining who is the "owner" within the definition in s. 141. Where the nuisance arose from structural defects in the premises, it would in many cases be impossible to enforce the summary remedies given by the Act, or, at any rate, great delay in enforcing them would be caused, if a nuisance order could not be obtained until the owner was ascertained, and the provisions of the Act are intended to avoid those results. Sect. 120, sub-s. 4, provides that "whenever in any proceeding under the provisions of this Act relating to nuisances it becomes necessary to mention or refer to the owner or occupier of any premises, it shall be sufficient to designate him as the 'owner' or 'occupier' of such premises without name or further description." A summons is

clearly a "proceeding" under the Act, and the form of summons given in the third schedule to the Act shews that the summons may be addressed either to a named person, or to the "owner or occupier" of the premises without naming him. Sect. 128 is intended to provide for the service of such a summons, which is a "document" within the meaning of the words "notice, order, or other document." The provisions in Jervis's Act with respect to service of summonses cannot be applied where the owner is not known or cannot be found; and unless the summons in such a case can be served under s. 128 of the Act of 1891, there is no mode of serving it at all. By s. 117 the procedure under the Summary Jurisdiction Acts is intended to apply except where it is varied by this Act, and s. 128 does vary the procedure under Jervis's Act by directing that summonses may be served in a different way. The words "notice, order, or other document" are wider than the words "notices, summonses, and orders" in s. 31 of the Nuisances Removal Act, 1855, and are intended to cover all documents, besides notices and orders, issued in any proceeding under the Act of 1891. Neither under that Act of 1891, nor under Jervis's Act could a fine be inflicted upon a person who was not known or could not be found; but under the Act of 1891 the "owner" of the premises may be summoned before the petty sessional court upon the complaint of the sanitary authority, and if he appears, or becomes known, or is found, proceedings under Jervis's Act, which may result in a fine being inflicted, may be taken against him.

CHARLES, J. In this case the magistrate declined to hear and determine the matter of a complaint, which came before him on a summons, on the grounds, first, that the summons itself was defective, and, secondly, that it had been improperly served. If either of these objections is capable of being sustained the magistrate had no jurisdiction. The question depends upon the true construction to be placed upon certain sections of the Public Health (London) Act, 1891, and, after having entertained considerable doubt, I have come to the conclusion that our duty is to make the rule absolute. The objection taken to the summons itself is that it designates no one; it is not addressed

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to the owner or occupier of the premises by name, but is merely directed to "the owner" of the premises. Now, the justification for that is to be found in the Act and the schedules. By s. 120, sub-s. 4, "whenever in any proceeding under the provisions of this Act relating to nuisances it becomes necessary to mention or refer to the owner or occupier of any premises, it shall be sufficient to designate him as the 'owner' or 'occupier' of such premises, without name or further description." That was done here, and this summons is assuredly a "proceeding" under the provisions of the Act. In the third schedule a form of summons is given which obviously contemplates that the summons may either be addressed to the owner or occupier by name, or "to the owner or occupier of" the premises simply. I therefore think that the summons itself was not defective by reason of its being directed to the owner without naming him.

The next question is, Was this summons duly served? Sect. 117 provides that all offences, fines, penalties, forfeitures, costs and expenses directed to be prosecuted or recovered in a summary manner under the Act may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts. Upon reference to those Acts, it is clear that the mode of service there prescribed was not followed in the present case, because under Jervis's Act a summons is to be served upon the defendant personally, or by leaving it at his last known place of abode. That was not done here; advantage was taken of s. 128 of the Public Health (London) Act, 1891, and the summons was served by delivering it, or a copy of it, addressed simply "to the owner" of the premises, to some person found on them. The main point, therefore, is, do the provisions of s. 128 apply to the service of this summons? It is said that they do not, and that the summons ought to have been served under the provisions of the Summary Jurisdiction Acts. The earlier sections of the Act of 1891 must be referred to in order to determine the matter. Sect. 4 imposes liability to be dealt with summarily and fined upon a person who has made default in complying with the requisitions of the notice to abate a nuisance. Sect. 5 also provides that if the person on whom the notice has been served makes default in complying with any of

the requisitions thereof within the time specified, the sanitary authority shall make a complaint, and the petty sessional court hearing the complaint may make a nuisance order on such person, which order, if necessary, may be executed by the sanitary authority. Now, looking at that section alone, it might be contended that the summons to enforce the complaint of the sanitary authority must be a summons in the form provided by Jervis's Act, and that it must be served under that Act. But s. 8 of the Act of 1891 provides that where the person by whose act, default, or sufferance a nuisance liable to be dealt with summarily arises, or the owner or occupier of the premises, is not known or cannot be found, then the nuisance order may be addressed to, and if so addressed shall be executed by, the sanitary authority. It is clear, therefore, that if, as I think is the case, the complaint of the sanitary authority must be enforced by summons, it may be enforced by summons although the owner or occupier of the premises is not known or cannot be found. If that state of things arises, a nuisance order may be made addressed to the sanitary authority instead of to the person who is not known, or cannot be found. I think, therefore, that the summons may be in the form of the summons in this case, and may be dealt with as a summons under the Act of 1891. If so, does it come within ss. 127 and 128? Sect. 127 provides for the authentication of "notices, orders, and other such documents under this Act." Sect. 128 prescribes the mode of service (which was followed in this case) of "any notice, order, or other document required or authorized to be served under this Act." Mr. Sutton contended that a summons was not covered by those words. It was not, he said, a notice or an order, and it did not come within the words "or other document." He pointed out that in the Nuisances Removal Act of 1855, s. 31, "summonses" were expressly included with "notices and orders," though they are not so included in s. 128 of the Act of 1891; and he said that summonses had been advisedly dropped out of s. 128, because under the Act of 1855 the procedure was that a notice to abate was first given, then followed an order for the removal of the nuisance, and, if the person to whom the notice to abate has been given did not comply with the removal

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order, he was fined for disobedience to that order; whereas by the Act of 1891 the magistrate may fine for default in complying with the notice to abate. No doubt the language and procedure of the two statutes are different; but I cannot see that there is any reason for not construing s. 128 as including a summons as well as a notice or order. It was said that by sub-s. 3 of s. 128 the only document which could be served upon the owner or occupier of the premises without naming him was a notice, and therefore that a summons could not be so served. The answer to that contention is to be found in sub-s. 4 of s. 120, to which I have already referred. I am of opinion, therefore, on the true construction of s. 128, that a summons may be served in the manner pointed out by sub-s. 1. At first sight it would seem that a strange result follows, namely, that a penalty may be inflicted upon a person though he is unknown and cannot be found at the time the summons was issued. I do not, however, think that that result does follow. If he cannot be found, the magistrate may make a nuisance order against him under s. 5, but he cannot be fined because he cannot be found. When he is found, the sanitary authority cannot ask the magistrate to fine him merely because he has been found. It would be necessary first to hold a judicial inquiry whether he was in default, and for that purpose to serve another summons. I do not think, therefore, the hardship suggested would arise. I am of opinion that this summons was not defective, that it was regularly served, and that this rule should be made absolute.

COLLINS, J. I am of the same opinion. The whole question is whether the summons issued in this case was issued and served in such a form and manner as to found jurisdiction. The magistrate has held that it was not, and has declined jurisdiction. If the true construction of s. 128 is that under the words "any notice, order, or other document" a summons is embraced, then the objection to the jurisdiction falls to the ground. Here a summons was issued in the form prescribed by the statute, and served in the manner prescribed by s. 128. It was contended that the words "notice, order, or other document" do not embrace a summons, and that, there being no provision for the

service of a summons in the Act of 1891, this summons ought to have been served under Jervis's Act. It was not in the form of a summons under Jervis's Act, nor was it served in the manner prescribed by that Act, and it is said, therefore, that the magistrate had no jurisdiction. Now, it is true that by s. 117 of the Act of 1891 all offences, fines, penalties, &c., under that Act directed to be prosecuted or recovered in a summary manner, may be prosecuted and recovered in manner directed by the Summary Jurisdiction Acts; but if the words of s. 128 of the Act of 1891 embrace a summons, then, reading all the provisions of the Act together, it becomes clear that a summons in the form prescribed by the Act may found jurisdiction outside Jervis's Act. I am clearly of opinion that those words do embrace a summons. In the third schedule to the Act of 1891 there is a form of summons given which is the same as the form used in this case. It is a form which, unlike the form under Jervis' Act, is capable of being addressed to the owner or occupier of premises without any other name or description. It was suggested in argument that it might have got into the schedule by mistake; but the presumption is that it was put there for the purpose of enabling the provisions of the Act to be carried into effect, because there is a specific provision in s. 8 which assumes that a complaint can be made against a person not capable of being designated. Sect. 8 enables the petty sessional court, where the person by whose act, default, or sufferance a nuisance liable to be dealt with summarily under this Act arises, or the owner or occupier of the premises is not known or cannot be found, to address the "nuisance order" to the sanitary authority, who are to execute it. It has been pointed out that s. 8 is dealing with a case which can only be met by a summons addressed to a person who is not capable of being designated, and that serves to shew that the form in the schedule did not get there by mistake. It accounts for the form being there; because, unless we read the words of s. 28, sub-s. 1, as embracing a summons, there would be no machinery provided by the Act for carrying out the provisions of s. 8. I think, therefore, it is clear that this summons was regular in form, and capable of being served under s. 128. It was urged upon us that extraordinary

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consequences would follow if we held that a man might be made amenable to the Court of Summary Jurisdiction and subjected to fines or penalties when his name was not known. I think that argument on examination cannot be supported. By s. 4, sub-s. 1, notice requiring the abatement of a nuisance shall be served by the sanitary authority on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises; but sub-s. 4 only imposes the liability to be fined for default where the notice has been served on a person under the section. I think that the provisions of sub-s. 4 cannot be made available against a person who is not capable of being designated. Though the summons may be issued, under s. 4, against such a person, it cannot result in his being fined unless he is known and the notice has been served upon him. The mischief suggested does not, therefore, seem to me to follow, and the position that a summons can be served under the Act upon a person not designated is not negatived by the argument founded upon that suggestion. Sect. 5 provides what is to happen in the case of non-compliance with the notice to abate. If the person on whom the notice has been served makes default in complying with the requisitions of the notice to abate, the sanitary authority are to make a complaint, and a nuisance order may be made against the person in default, which may be an abatement order, a prohibition order, a closing order, or a combination of such orders. Reading ss. 5 and 8 together, it follows that an order under sub-s. 2 of s. 5 and an order under s. 8 may be made in respect of a person not before the Court, and whose identity cannot be ascertained. The whole Act becomes perfectly consistent if the words in s. 128, "notice, order, or other document," are read as embracing a summons.

For these reasons I am of opinion that this rule should be made absolute.

Rule absolute.

Solicitors for the applicant: *C. B. Young & Son.*

Solicitor for the Treasury: *The Solicitor of the Treasury.*

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[IN THE COURT OF APPEAL.]

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March 9.

IN RE BEALL. EX PARTE BEALL.

Bankruptcy—Discovery of Debtor's Property—Private Examination—Application to take Depositions off File—"Proceeding"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 27—*Bankruptcy Rules,* 1886, *r.* 12.

Depositions taken in a bankruptcy at a private examination under s. 27 of the Bankruptcy Act, 1883, are a "proceeding of the Court" within rule 12 of the Bankruptcy Rules, 1886, and ought to be placed on the file of proceedings in the bankruptcy.

Application by a bankrupt to have depositions so taken removed from the file refused.

APPEAL by Edward Beall, a bankrupt, against the refusal by one of the registrars of an application made by the bankrupt that the depositions of certain witnesses, taken at a private examination at the instance of the official receiver, by whom the witnesses had been summoned for examination under s. 27 of the Bankruptcy Act, 1883, might be removed from the file of proceedings in the bankruptcy.

The bankrupt had desired to be present at this examination and to cross-examine the witnesses, but the registrar had refused to allow him to be present. Upon the report of the official receiver, which was founded in part upon these depositions, the registrar refused to grant the bankrupt a discharge. The depositions were not filed until after this refusal. The bankrupt was a solicitor, and one of the grounds of his application to take the depositions off the file was, that while they were on the file they would be open to the inspection of any creditor who had proved, and of any person on behalf of any such creditor, and might in this way be used to the prejudice of the bankrupt, especially with reference to an investigation by the statutory committee of the Incorporated Law Society of some charges which had been made against him.

Herbert Reed, Q.C., and *Macaskie,* for the bankrupt. As the bankrupt had no opportunity of cross-examining the persons examined in private their evidence is one-sided. If he could

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have cross-examined those persons he might have put a very different complexion on the story which they told. Under rule 12 (1) of the Bankruptcy Rules, 1886, any creditor who has proved, or any person on behalf of such a creditor, can, so long as the depositions are on the file, inspect them, and in this way they may be used to the prejudice of the bankrupt in the proceedings before the committee of the Incorporated Law Society. This would be very unfair to the bankrupt, and it would be right to order the depositions to be taken off the file.

These depositions are not a "proceeding" within rule 12: *In re Greys' Brewery Co.* (2); *In re Norwich Equitable Fire Insurance Co.* (3). The depositions were placed on the file prematurely, and the Court will not allow them to remain there if any harm will be done to the bankrupt. They are private and privileged documents: *Learoyd* v. *Halifax Joint Stock Banking Co.* (4). At any rate, the depositions ought to be sealed up.

Muir Mackenzie, for the official receiver, was not called upon.

LORD ESHER, M.R. Mr. Reed's first great complaint was that, when these witnesses were examined under s. 27, the debtor was not allowed to be present to cross-examine them as to the

(1) By s. 27 of the Bankruptcy Act, 1883:—

"(1.) The Court may, on the application of the official receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property."

"(3.) The Court may examine on oath, either by word of mouth or by written interrogatories, any person so brought before it concerning the debtor, his dealings or property."

By the Bankruptcy Rules, 1886, r. 12: "All proceedings of the Court shall remain of record in the Court, so as to form a complete record of each matter, and they shall not be removed for any purpose, except for the use of the officers of the Court, or by special direction of the judge or registrar, but they may at all reasonable times be inspected by the trustee, the debtor, and any creditor who has proved, or any person on behalf of the trustee, debtor, or any such creditor."

(2) 25 Ch. D. 400.

(3) 27 Ch. D. 515.

(4) [1893] 1 Ch. 686, 693.

truth of what they said, and as to their character. It was said that, this being contrary to natural justice, these depositions ought not to be put on the file. Ought, then, the debtor to be allowed to be present for that purpose at that stage? Every judge has decided that the debtor has no right to be present then. As to the notion that it is contrary to natural justice that the debtor should not be permitted to be present, there is no adjudication against him at that stage. There is only information being collected for the purpose of being laid before the Court of Bankruptcy when it has to consider whether it will or will not grant a discharge to the bankrupt, under ss. 28 and 69 of the Act. The examination is in one sense a judicial proceeding, because it is a step in the course of judicial procedure, but it is not a judicial decision.

Then it was said that these depositions ought not to have been placed on the file at all, and, therefore, they ought to be taken off the file; and if, at some time or other, they ought to be placed on the file, yet this ought not to be done without the leave of the Court. Again, it was said that, even if the depositions were rightly placed on the file without the leave of the Court, yet they ought to be taken off, for fear that the committee of the Law Society, who have nothing to do with the bankruptcy and are not proceeding under the Bankruptcy Act, should see them.

In my opinion, every step taken in the bankruptcy for the purpose of enabling the Court to come to a final determination ought to be placed on the file. This is in fact always done. The proposition that these depositions, taken under s. 27 for the purpose of enabling the official receiver to make his report "as to the bankrupt's conduct and affairs," are not "proceedings of the Court" in the bankruptcy, cannot, as it seems to me, be maintained for a moment.

Therefore these depositions were rightly placed on the file. Is it any disadvantage to the debtor that they should be on the file? To my mind, it is clearly to his advantage, if they are not true, because, they being on the file, when the report of the official receiver is produced against him (and that report is, by s. 28, sub-s. 4, primâ facie evidence of the statements therein contained), the debtor can look at the file, and then he will see

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that, in order to enable the official receiver to make his report, he has examined certain witnesses, and they have stated certain things. That would give him the clue at once, and he will at once say to the Court, "I can contradict everything which those witnesses have said." I do not say that the debtor would be allowed to adduce evidence that the witnesses had committed some offence before which rendered their testimony unworthy of credence. That would be matter for cross-examination. He could contradict what they had said, and he would be prepared to do so. It would be to his advantage, therefore, to have seen these depositions on the file, and what the disadvantage to him would be I cannot conceive. But, whether it is an advantage or a disadvantage to him, in my opinion it is a fundamental rule in bankruptcy proceedings, that everything which has been done in the bankruptcy shall be placed on the file, so that the Court which has ultimately to determine the matter should at all events know how and on what grounds everything has been done. Therefore, as I have said, the depositions ought to be placed on the file, and in this case they were placed on the file. The application is to take them off the file, or it is said they might be sealed up. I cannot conceive their being sealed up except upon some very strong ground, which must at any rate be shewn by affidavit. There is no such affidavit here; there is nothing but suspicion, stated by counsel without any affidavit, that the committee of the Law Society want to look at the file. If they do look at it, it will not help them. They are inquiring into the conduct of the bankrupt as a solicitor; and, if they wish as against him to make use of these statements which are on the file, they must call the witnesses; and when the solicitor—the accused—is brought before the committee, he will have the opportunity of answering what the witnesses say, or of testing what they say. Moreover, the committee of the Law Society have not to adjudicate finally on the matter; they have only to elicit information for the purpose of making a report, if they think it right to do so, to the Divisional Court, upon an application to strike the solicitor off the rolls. There is no final adjudication by the committee.

Again, we have nothing to do now with any application by

the Law Society. We are sitting as a Court of Appeal in bankruptcy, and the bankrupt is appealing against an order in bankruptcy. We have nothing now to do with any application to strike him off the roll of solicitors. He is, therefore, asking us to interfere in a matter which is not and cannot now be brought before us. In my opinion, this appeal is without any foundation, and it must be dismissed.

LOPES, L.J. I also am of opinion that this application cannot be granted. It is in substance an application that these documents, containing the evidence of certain witnesses, should be taken off the file. It was said (and at first I was inclined to think that there was some force in this argument) that it was very unjust to the debtor that this evidence should be taken behind his back. I thought at first that there was something in that; but, when one considers the purpose and result of this evidence, I think there is nothing unjust in its being so taken. The examination of these witnesses is taken by the official receiver simply for the purpose of instructing his mind and enabling him to make his report.

When the debtor applies for his discharge, his application is brought before the tribunal which has to decide whether he shall be discharged or not, and then he has the fullest opportunity, if he thinks fit, of impeaching the evidence of these witnesses. I am inclined to think that he might, if he desired it, call the witnesses himself and cross-examine them, inasmuch as they would be in the nature of hostile witnesses, and might thus extract everything from them—everything which would go to impeach their testimony. When, therefore, one considers what is the object of such an examination, I do not think it can be said that there is anything unjust to the debtor in not allowing him to be present. But there is ample authority to shew that the debtor has no right to be present when such evidence is being taken. That disposes of the first objection.

Then it is said that these depositions are not "proceedings of the Court" which ought to be filed. It seems to me that that is an absolutely unarguable point. They were taken for the purpose of the bankruptcy in order to discover what the conduct

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of the bankrupt had been, and whether the Court would be justified in refusing him a discharge, and for the purposes of founding the official receiver's report. It cannot be said that they are not a "proceeding" which ought to be filed.

In the present case these depositions were not filed until after the bankrupt's application for a discharge had been made. I cannot help thinking that they ought to have been filed before that application, in order that the debtor might have had an opportunity of dealing with them. However, that is past and gone, and they were filed afterwards. That being so, we are now asked to take them off the file. I am not aware of any authority which would justify the Court in taking the depositions off the file after they have been placed there. But, however that may be, I am clearly of opinion that it would not be right to make such an order, even if there be power to make it. It has been suggested by the appellant's counsel that the contents of the depositions will be ascertained by the committee of the Incorporated Law Society, who it is said are about to inquire into the conduct of the bankrupt, and that use will be made of them to his prejudice. I think there is no ground for that apprehension. The committee of the Law Society are a body of lawyers, and they will not attach the slightest importance to these documents, which are not, per se, evidence against the debtor of any sort or kind. The witnesses would have to be called in the presence of the debtor, and he would have the fullest opportunity of cross-examining them, and he would no doubt be very much assisted in his cross-examination by having seen the depositions, and he might if necessary be able to shew that a great deal of what the witnesses had said in them was untrue.

On all these grounds I am of opinion that this appeal must fail.

DAVEY, L.J. If upon his application for a discharge the bankrupt were asking that the depositions, on which presumably the official receiver's report was founded, might be placed upon the file in order that he might be able to see them, I should think that his request would be worthy of great consideration. But that stage of the proceedings is past and gone. No such

request was made when the bankrupt applied for his discharge, and that application has been disposed of. The depositions have now been placed on the file, and I have no doubt that they were properly placed there.

The depositions were taken by the Court at the instance of the official receiver, and were taken down by a shorthand writer, who was sworn and who thereby became the agent of the Court. They were in fact taken by the Court itself for the purpose of the proceedings in the bankruptcy. Why they should not be placed on the file, like any other proceedings in the bankruptcy, I am at a loss to understand, and, they being on the file, I can see no ground whatever for taking them off. They are placed there for the inspection of the debtor and of any other person who is entitled to inspect them under rule 12. Although they were taken at the instance of the official receiver for the purpose of enabling him to make his report, they may be made use of, so far as they properly can, by any person who is entitled to inspect them.

On these grounds, therefore, no authority having been cited for taking such proceedings off the file, and no good reason having in my opinion been suggested for taking them off, I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Beall & Co.; Solicitor to Board of Trade.*

W. L. C.

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Feb. 28;
March 1.

ROTHSCHILD & SONS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Bill of Exchange—Coupon for payment of Interest on perpetual Bond—Re-issue of Coupons—Stamp Act, 1870 (33 & 34 *Vict. c.* 97), *s.* 48, *Sched.—Revenue Act,* 1889 (52 & 53 *Vict. c.* 42), *s.* 16.

In 1881 the Hungarian Government issued bonds of perpetual obligation at 4 per cent. containing the following statement: "This bond is provided with a talon and interest coupons for ten years at the expiration of which the bearer of the talon will receive on delivery of the same a fresh coupon sheet with another talon." Coupons for ten years were attached to the talon and issued with the bond, such coupons being payable to bearer at the various places thereon specified. The talon merely contained a statement that in July, 1891, the Hungarian Government would deliver to the bearer new coupons and another talon. In July, 1891, the Hungarian Government accordingly issued new talons with coupon-sheets attached in the same form, mutatis mutandis, as the issue of 1881:—

Held, that the new coupons were bills of exchange payable on demand, and that, since they were not attached to and issued with either the security or any agreement or memorandum for the renewal or extension of time for payment of the security, they did not fall within any of the exemptions provided by the Stamp Act, 1870, and s. 16 of the Revenue Act, 1889, and were therefore liable to be stamped with a 1*d.* stamp.

CASE stated by the Commissioners of Inland Revenue under 54 & 55 Vict. c. 39, s. 13.

A coupon or warrant for interest payable on January 1, 1892, in respect of a bond of the Royal Hungarian Consolidated State Debt, bearing interest at 4 per cent. per annum, was presented, on behalf of Messrs. N. M. Rothschild & Sons, as agents in London for the Hungarian Government, to the Commissioners of Inland Revenue under the provisions of s. 18 of the Stamp Act, 1870, for the opinion of the commissioners as to the stamp duty (if any) with which the said coupon was chargeable.

The coupon was printed in the English, French, German and Hungarian languages, the following being the English: "4 per cent. Royal Hung. Consolidated State Debt. Pay Jan. 1, 1892, at either of the places marked on the back." "£2."

The coupon was indorsed—among other places—"Pay offices -London. N. M. Rothschild & Sons."

It was agreed that the word "pay" in the English portion of the coupon must be taken to mean "payable."

The coupon was issued for payment of interest upon one of a series of Royal Hungarian bonds forming the 4 per cent. loan of 1881. These bonds are also printed in the English, French, German and Hungarian languages, and the following is a copy of the material parts of one of the bonds as printed in English: "The Royal Hungarian Ministry of Finance declares this bond for 100 florins in gold forms part of the Consolidated Hungarian State Debt which is exempt from every tax. This bond bears interest at the rate of 4 per cent. per annum payable half-yearly in gold on the first of January and first of July of each year. The holder of this bond may on surrender of the coupon receive the interest . . . . in London in pounds sterling . . . . This bond is provided with a talon and interest coupons for ten years at the expiration of which the bearer of the talon will receive on delivery of the same a fresh coupon sheet with another talon. The principal and interest of these bonds are exempt now and for ever from all Hungarian Stamp Duties and Income Taxes."

The following is a copy of the talon (referred to in the bond) as printed in English: "The Royal Hungarian State Debt Office will deliver to the bearer of this talon on or after July 1, 1891 new coupons and another talon."

The bond was stamped with the ad valorem duty applicable to a mortgage, and unstamped coupons for the interest thereon payable each half-year down to and including July, 1891, were attached to the talon hereinbefore mentioned, and were issued with the bond. These coupons were detached and payment made upon them at one of the indicated places as each half-year's interest fell due.

In July, 1891, Messrs. N. M. Rothschild & Sons, as London agents for the Hungarian Government, were furnished by it with new talons with coupons for the ensuing ten years' payment of interest attached, and they accordingly issued a notice to the holders of the bonds informing them that the new coupon-sheets and talons could be obtained from them.

The new talon was an exact counterpart, mutatis mutandis, of the original talon.

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The coupon in question was the first in date of the coupons on the new sheet attached to the new talon so issued.

The Revenue authorities at the time of the issue of the before-mentioned notice by Messrs. N. M. Rothschild & Sons intimated to them that such new coupons should be each stamped with a stamp for 1*d.* as a bill of exchange payable on demand within the meaning and effect of the Stamp Act, 1870. Messrs. Rothschild & Sons ultimately paid the amount demanded under protest, and this case was stated by the commissioners for the opinion of the Court.

By the Stamp Act, 1870, which imposes a stamp of 1*d.* on a bill of exchange payable on demand, the term "bill of exchange" is thus defined in s. 48, sub-s. 1: "The term 'bill of exchange' for the purposes of this Act includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank-note) entitling, or purporting to entitle, any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned."

Among the exemptions contained in the schedule to the Act under the head "Bill of Exchange" is (sub-s. 9), "Coupon or warrant for interest attached to and issued with any security."

By s. 16 of the Revenue Act, 1889: "The exemption from stamp duty under the head 'Bill of Exchange' in the schedule to the Stamp Act 1870 of 'coupon or warrant for interest attached to and issued with any security' shall extend to a coupon or warrant for interest attached to and issued with any agreement or memorandum for the renewal or extension of time for payment of a security." (1)

Sir Henry James, Q.C., and *Pollard*, for the appellants. This coupon is not a bill of exchange. It does not come within the definition given by the Bills of Exchange Act, 1882. There is no drawer of the bill from whom the holder is entitled to payment. Assuming, however, that it is a bill of exchange, it is exempted from stamp duty, as being "attached to and issued

(1) Both these sections are repealed and substantially re-enacted by the Stamp Act, 1891 (54 & 55 Vict. c. 39).

with" the security under the exemption given by the Stamp Act, 1870. Constructively, the coupon was issued with the original security in 1881, since it was then stated that it would be issued in ten years' time. It would be inconvenient to issue coupons for more than ten years with the bond, and the coupons ought not to be liable to stamp duty simply because it is impossible to issue with the bond coupons for all time. If, however, it is not exempt under the Stamp Act of 1870, it comes within s. 16 of the Revenue Act, 1889. The talon must be taken to be "a memorandum for the renewal or extension of time for payment of a security."

The Attorney General (Sir Charles Russell, Q.C.), and *Danckwerts*, for the Crown. The Revenue Acts are of an artificial and arbitrary character, and must be judged by themselves. This coupon may not be a bill of exchange at common law or under the Bills of Exchange Act, 1882. It is plainly within the Stamp Act, 1870, as is shewn by the exemption, and it is not within the exemption because it is not attached to and issued with the security: *Australasian Mortgage and Agency Co., Limited* v. *Commissioners of Inland Revenue.* (1) Nor does it fall within s. 16 of the Revenue Act, 1889. The talon is not an agreement or memorandum for the renewal or extension of time for payment of the security. The security is a bond of perpetual obligation, and cannot be renewed or extended.

MATHEW, J. If it were the function of the Court to surmise what the legislature meant, I should have very little doubt that documents of this description were not intended to be subject to this tax; but our limited function is not to say what the legislature meant, but to ascertain what the legislature has said that it meant; and we are confined to the terms of the Act of Parliament with which we have to deal.

Now, the document in question, which is alleged by the commissioners to be subject to this tax, is a coupon of the Hungarian Government in respect of a bond issued by the government as a part of a loan transaction, and on the face of the bond is a statement of the fact that a sheaf of coupons is issued with the bond

(1) 16 Court Sess. Cas. 4th Series (Rettie) 64.

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—coupons for ten years in advance—the bond being a bond alleged to be of perpetual obligation. Accompanying the bond and the coupons is a talon, which informs the bearer that at the end of ten years a further group of coupons will be issued for the next decade; and it is clear that at the end of that period a similar document will be forthcoming for the following decade with coupons for that period. The form of the coupon is given in the case; and if we were to judge of its effect merely by the language used, there would be a great deal in the argument that all that was meant was to notify to the holder of the bond the places where the interest would be payable. The coupon runs: "Payable on the first of January 1892 at either of the places marked on the back," and then the indorsement describing the places of payment gives the name in London of N. M. Rothschild & Sons. But in construing this document and ascertaining its effect, we must bear in mind its commercial character. A coupon is a security of the highest value; it is a security which when issued by such a government as this is held in the commercial world to be "as good as gold." It passes from hand to hand, as we all know, before and after it becomes payable, and is regarded as cash. In other words, the Hungarian Government undertakes with those who lend money to it that there will be, at the time when the interest becomes payable, money in the hands of their bankers or their agents at these different places to pay the amount of interest.

That being the character of the document, in what way does it differ in its commercial character from a bill of exchange or a cheque? It is an intimation to the holder that the money will be forthcoming for the payment of the coupon, through the hands of the agents of the borrowing Government. Bearing that in mind, we have to turn to the Stamp Act of 1870. Sect. 48 says: "The term 'bill of exchange' for the purposes of this Act includes also draft, order, cheque, and letter of credit, and any document or writing (except a bank-note) entitling, or purporting to entitle, any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money therein mentioned." That appears to me to describe a coupon. Having regard to what the docu-

ment is and how it is used, anybody holding a coupon would consider himself entitled to present it as a draft for payment by Messrs. Rothschild & Sons of the amount of money stated in it.

Then our attention was called to something very material in the Act itself—namely, the terms of the schedule. It will be observed that in s. 48 a bank-note is exempted from stamp duty; and if the schedule is referred to, it will be seen that an addition has been made to that exemption of a "coupon or warrant for interest attached to and issued with any security." This addition shews that such a coupon is treated by the legislature as a bill of exchange, and would fall under the other provisions of the Act if it were not for the exemption. Then is this coupon within the terms of the exemption? We think not. We are fortified in that view by the judgment in the Scotch Court in the *Australasian Mortgage and Agency Co., Limited* v. *Commissioners of Inland Revenue* (1), which has been referred to by the Attorney General, and I am unable to distinguish the document in that case from the coupon in the present case. If the matter stood there then, it is quite clear that this coupon must be subject to this tax because it is not "attached to and issued with any security"; but there is a later Act, which was relied upon by Sir Henry James and which we have to consider very carefully, with every desire, if possible, to extend it to the document in question, because of the strong probability that the legislature did not mean a document of this sort to be subject to this tax. Sect. 16 of the Revenue Act, 1889, runs thus: "The exemption from stamp duty under the head 'Bill of Exchange' in the schedule to the Stamp Act, 1870, of 'coupon or warrant for interest attached to and issued with any security' shall extend to a coupon or warrant for interest attached to and issued with any agreement or memorandum for the renewal or extension of time for payment of a security." It is said that the document in question comes under the protection of that clause. But, again, we are compelled to adhere to the letter of the clause, and nobody who reads this section, bearing in mind the decision of the Scotch Court, can doubt that the section was exactly measured by the decision of the Scotch Court, because in that

(1) 16 Court Sess. Cas. 4th Series (Rettie), 64.

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case there was a memorandum and an agreement, too, for the renewal and extension of the time of payment of a security. Such a case would be clearly within the language of the section. But is this such a case? I regret to have to come to the conclusion that the section does not embrace this case, and for the reason that the obligation is admitted to be perpetual in its character, and therefore there can be no memorandum for the renewal or extension of time for payment of the security. That being so, the language does not apply to this particular case, and we are compelled to say that it stands as it would have stood under the Act of 1870, if my construction of that Act is correct, and that the document is liable to be taxed.

For these reasons I consider that the appeal must be dismissed.

CAVE, J. I am of the same opinion.

It was contended, and contended with considerable force, that this document is not a bill of exchange in the ordinary mercantile sense of the term; but it is clear from s. 48 of the Stamp Act, 1870, that such a document is intended to be included in the term, although it would not, according to ordinary commercial language, be so included. It seems to me clear that this coupon purports to entitle the holder to payment of the sum of 2*l*. That being so, it comes within every requirement of the Act of Parliament.

I am by no means satisfied that it is at all necessary, in order to bring it within the section, that it should be a mandate directed by one man to another to pay a sum of money to a third person. All s. 48 says is, "a document entitling any person, whether named therein or not, to payment by any other person of a sum of money." Without deciding questions which are not before me, I think it is enough to say that in my judgment it does come within the actual words of the section, and is a document purporting to entitle the holder to receive from another person the sum of money—2*l*.—therein mentioned.

If, then, it is a bill of exchange within s. 48, is it within any of the exceptions which have been grafted upon that section? The first exception is to be found in the schedule to the Act;

and it is an exemption of a "coupon or warrant for interest attached to and issued with any security." There, however, in order that the exemption may prevail, the legislature has required that the coupon should be attached to and issued with the security. The security in this case is the bond; and this coupon is not attached to or issued with it in the ordinary meaning of those words. I think it is not sufficient to say that it might possibly have been attached to and issued with it. It is not attached to and issued with it, and consequently does not come within the exemptions contained in the schedule.

But there is another exemption contained in the 16th section of the Act of 1889; and at first I was inclined to think that this coupon might be brought within the exemption therein indicated; but, upon further consideration, I am satisfied that that cannot be done. The words are: "The exemption from Stamp Duty under the head 'Bill of Exchange' in the schedule to the Stamp Act, 1870, of 'coupon or warrant for interest attached to and issued with any security' shall extend to a coupon or warrant for interest attached to and issued with any agreement or memorandum for a renewal or extension of time for payment of a security"; and no doubt that does extend the exemption contained in the schedule to the Act of 1870. But in what cases does it extend that exemption? Only where the coupon is attached to and issued with some agreement or memorandum for the renewal or extension of time for payment of a security. In this case the new coupons are attached to and issued with the new talon; and, therefore, it must be shewn that the talon amounts to an agreement or memorandum for the renewal or extension of time for payment of the security. But the security entitles the holder to perpetual payment of a sum of money half-yearly, by way of interest upon a bond for so much money; and consequently this talon is not a memorandum or agreement for the renewal of that security. The security does not require to be renewed, because it has not expired. Neither is it a memorandum or agreement for an extension of the time for payment of the security. There is no time fixed for the payment of the security; and the talon does not give an extension of time for such payment. It purports to entitle

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the holder of it at the end of ten years to receive another talon and another set of coupons. That is what the talon is intended to do: it settles the person who is entitled to the new talon and the new coupons, and is a memorandum to that effect. But that is not a memorandum either for a renewal or for an extension of time for the payment of a security. I come, therefore, to the conclusion that the legislature has expressed in sufficiently plain terms an intention that this document should be subject to the Stamp Duty, and that it has not expressed an intention to exempt it from payment.

I agree with my brother, that our judgment in this case must be for the respondents.

Appeal dismissed.

Solicitors for appellants: *Dawes & Sons.*

Solicitor for respondents: *The Solicitor of Inland Revenue.*

A. P. P. K.

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March 3.

ATTORNEY GENERAL *v.* DODD.

Revenue—Account Duty—Conversion of Realty into Personalty—Customs and Inland Revenue Act, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*).

In 1885 by a voluntary settlement A. conveyed certain real estate to trustees on trust that they should on the request of A. and his wife or the survivor of them, and after the decease of the survivor, at their own discretion, sell such real estate and stand possessed of the proceeds in trust for A. for life, and after his death on certain trusts therein declared, and on failure of those trusts in trust for A., his executors, administrators, and assigns. A. died in 1887 without any such request having been made, and the real estate remained unsold:—

Held, that it must be treated as having been converted into personalty by the voluntary settlement in 1885, and must, therefore, be included in an account and charged with duty under s. 38 of the Customs and Inland Revenue Act, 1881.

INFORMATION by the Attorney General praying that it might be declared that certain hereditaments passing under an indenture of voluntary settlement, dated May 22, 1885, were personal property within the meaning of s. 38, sub-s. 2 (*c*), of the Customs and Inland Revenue Act, 1881, and that they were chargeable with account duty as such.

By an indenture dated May 22, 1885, C. B. Greenwood assigned

the freehold hereditaments therein particularly described to the use of the defendant F. A. Dodd and J. A. Curtler (since deceased), their heirs and assigns, upon trust that the said F. A. Dodd and J. A. Curtler, or the survivor of them, or the executors or administrators of such survivor, or other the trustees or trustee for the time being of the indenture (thereinafter called the said trustees or trustee), should at the request in writing of the said C. B. Greenwood and J. B. Greenwood, his wife, or the survivor of them, during their, his, or her lifetime, and after the decease of such survivor, at the discretion of the said trustees or trustee, sell the said hereditaments and premises thereby assured, and should hold the residue of the moneys arising from any such sale, after payment of the costs as therein mentioned, upon the trusts declared concerning the same by an indenture of even date, and should pay the rents and profits of the said premises, until the same respectively should be sold, to the said C. B. Greenwood or his assigns during his life, and after his death to the said J. B. Greenwood during her life, to her separate use and without power of anticipation, and after the death of the survivor of the said C. B. Greenwood and J. B. Greenwood, should hold the rents and profits of the said hereditaments and premises until the same should be sold, upon the trusts declared concerning the same by the said indenture of even date.

By an indenture of even date made between the same parties, and reciting the last-mentioned indenture, it was witnessed that, in consideration of the natural love and affection of the said C. B. Greenwood for his wife and children, it was thereby agreed and declared that the said trustees or trustee should stand possessed of the residuary or net moneys to arise from the sale under the said trust for sale contained in the last-mentioned indenture of the said hereditaments and premises thereby assured, or any part thereof, on trust to invest the same in certain named investments, and to pay the income thereof to the said C. B. Greenwood and his assigns during his life, and after his death to hold the same upon certain trusts therein declared for the benefit of the wife and children of the said C. B. Greenwood, and it was provided that if there should be no child or grandchild of the said C. B. Greenwood and J. B. Greenwood, in whom the trust

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premises should vest absolutely, the trustees or trustee should stand possessed thereof in trust for the said C. B. Greenwood, his executors, administrators, and assigns, and it was further agreed and declared that the said trustees or trustee should pay and apply the net rents and profits of the said hereditaments and premises assured by the last-mentioned indenture until the same should be sold, or of the unsold part thereof for the time being, to the person or persons and for the purposes to and for which the income of the net moneys to arise from the sale thereof would be payable or applicable under the trusts thereinbefore contained.

C. B. Greenwood died on September 5, 1887, leaving his wife J. B. Greenwood and six children surviving. J. A. Curtler died in August, 1891. No request in writing or otherwise for the sale of the said hereditaments or any of them was ever made by C. B. Greenwood and J. B. Greenwood during their joint lives, or by J. B. Greenwood since the decease of C. B. Greenwood, and as a fact no sale of the hereditaments has taken place.

Application having been made on behalf of the Commissioners of Inland Revenue to the defendant, as the surviving trustee of the settlement, for account stamp duty in respect of the property passing under the settlement, the defendant refused to pay such duty on the ground that such property was not personal property within the meaning of s. 38 of the Customs and Inland Revenue Act, 1881.

This information was accordingly filed on behalf of the Crown.

By the Customs and Inland Revenue Act, 1881, s. 38, sub-s. 1, "Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

"(2.) The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—

* * * * *

"(*c*.) Any property passing under any past or future voluntary settlement made by any person dying on or after June 1, 1881, by deed or any other instrument not taking effect as a will whereby an interest in such property for life or any other period

determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right by the exercise of any power to restore to himself or to reclaim the absolute interest in such property." (1)

The Solicitor General (*Sir John Rigby, Q.C.*), and *Vaughan Hawkins*, for the Crown. The property is personalty, and was converted from realty by the operation of the indenture of 1885. The clause as to the request for sale has been frequently under the consideration of the Court, and has been held not to affect the conversion, but only to give directions as to the time and place for sale: *Fletcher* v. *Ashburner* (2); *Thornton* v. *Hawley* (3); *Wrightson* v. *Macaulay* (4); *Lechmere* v. *Earl of Carlisle* (5); *Clarke* v. *Franklin* (6); *James* v. *Castle.* (7) *In re Taylor's Settlement* (8) is easily distinguishable, as by the ultimate destination of the property there it was treated as realty, and not, as in this case, as personalty.

Secondly, the property, being once converted, is converted for all purposes, as is shewn by *In the Goods of Gunn* (9) and *Attorney General* v. *Marquis of Ailesbury* (10), where the law is well summed up by Lord Macnaghten (at p. 695). The case of *Matson* v. *Swift* (11) is there treated as exploded, and reliance was placed on *Attorney General* v. *Brunning* (12), *Attorney General* v. *Lomas* (13), and *Attorney General* v. *Hubbuck.* (14)

Herbert Reed, Q.C., and *Clavell Salter*, for the defendant. There was no out-and-out conversion. The trust for sale was contingent, as is evident from the construction of the deed. It depended on the request of the husband and wife, and could not take place without it. The case is practically the same as *In re Taylor's Settlement* (8) and *Davies* v. *Goodhew.* (15)

(1) The section is amended by s. 11 of the Customs and Inland Revenue Act, 1889 (52 & 53 Vict. c. 7).
(2) W. & T. L. C. 6th ed. vol. i. p. 968; 1 Bro. C. C. 497.
(3) 10 Ves. 129.
(4) 4 Hare, 487.
(5) 3 P. Wms. 211.
(6) 4 K. & J. 257.
(7) 33 L. T. (N.S.) 665.
(8) 9 Hare, 596.
(9) 9 P. D. 242.
(10) 12 App. Cas. 672.
(11) 8 Beav. 368.
(12) 8 H. L. C. 243.
(13) Law Rep. 9 Ex. 29.
(14) 13 Q. B. D. 275.
(15) 6 Sim. 585.

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On the second point, *In the Goods of Gunn* (1) is an imperfect guide, as it did not arise on this section. *In re De Lancey* (2), which was a decision of the Exchequer Chamber and has never been overruled, is an express authority that even if there is a conversion here the property is not converted for the purpose of the revenue laws.

Lastly, the property is not within the terms of the section, since the moment that the deed was executed the property passed to the trustees and was vested in them. It was admittedly realty at that time, and therefore it cannot be personal property "passing" under a settlement within the meaning of the Act.

MATHEW, J. Three questions are raised in this case: first, whether there was a conversion of this property from realty to personalty; second, if there was a conversion, whether it was a conversion for fiscal purposes, as well as for the purpose of the settlement in question; and, lastly, whether, assuming that there was a conversion, the terms of the Act brought it within the fiscal obligation.

On the first point two deeds have been brought before us: the property dealt with by the deeds is realty; the main object of the deeds is not to settle an estate, but to provide for children; and every clause in both deeds contemplates the assignment of land as realty which, at some future time, shall be converted into personalty, and when so converted, in case of failure of the objects of the trust, shall remain personalty, and be dealt with as personalty. In all such cases we must look at the real character of the transaction; and it seems to me, having regard to the two deeds, that we must treat this, so far as it has been accomplished, as a dealing with this land as an investment so long as it remains land, and a dealing with the proceeds of sale subsequently in a similar manner. But it is pointed out that the power of sale, according to the first of the two deeds, is subject to this, that the sale shall take place at the request of the husband and wife, or the survivor of them, and, in the event of no request, then, after their death, at the discretion of the trustees. And it was said for the defendant that this clearly

(1) 9 P. D. 242. (2) Law Rep. 5 Ex. 102.

made the conversion not imperative, but contingent and discretionary, and therefore that no conversion had taken place. But we have authorities upon the subject, and those authorities appear to me to shew that such clauses are only intended to give directions as to the time and circumstances under which the sale is to take place, and not to indicate that the sale must not take place ultimately. Our attention was called in the first instance to the case of *Thornton* v. *Hawley*. (1) There, no doubt, there was a direction that the sale should take place with all convenient speed; but there was inserted the sale condition, as it has been called, that it should be at the request of the persons mentioned in the deed. It was held that that did not prevent the conversion, and the clause in question is explained as a power to call on the trustees to act, and not as making the sale conditional on the consent, as it were, of the persons named. That case is followed by *Wrightson* v. *Macaulay* (2), and the same principle is indicated in the other cases that have been referred to. The Solicitor General very properly brought to our attention a case that might be relied on upon the other side: *In re Taylor's Settlement*. (3) There it was held that no conversion had taken place for reasons which are plainly indicated in the judgments. The sale was to take place during the lifetime of the husband or wife, and there was no provision that any sale should take place subsequently; and the ultimate destination of the property if no sale took place shewed that it was treated as realty and not as personalty. Therefore it was said that there was no out-and-out conversion. It is distinguishable from the present case, where it appears from the deeds that the property is ultimately dealt with as personalty and not realty. So much for the first point that was raised.

Then a second question was raised. Assuming that this property must be regarded in equity as converted into personalty, is it to be treated as converted for fiscal purposes? On that point our attention was called to the case of *In the Goods of Gunn* (4), where land directed to be converted into personalty was treated as subject to probate duty. It was said that that

(1) 10 Ves. 129.
(2) 4 Hare, 487.
(3) 9 Hare, 596.
(4) 9 P. D. 242.

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authority was recognised and sanctioned in the case of *Attorney General* v. *Marquis of Ailesbury* (1), and our attention was specially called to the observations of Lord Macnaghten in that case (at p. 695). Unquestionably in that case the property in question, regarded as money (although at common law it might be regarded as land), was treated as subject to fiscal obligation as if it were money. Mr. Reed, who argued the case on the other side, called our attention to the case of *In re De Lancey.* (2) That was a judgment of the Exchequer Chamber, and it would be an authority in his favour if we were bound to act upon it; but it is qualified by the decison in *Attorney General* v. *Lomas* (3), and is certainly inconsistent with the judgment of Lord Macnaghten in *Attorney General* v. *Marquis of Ailesbury* (1), which appeared to receive the sanction of the other Law Lords present. I cannot myself see why in principle any such distinction should be drawn as is suggested by *In re De Lancey.* (2) For all purposes, land converted into money is to be treated as money, either for the purpose of a settlement or for fiscal purposes, because equity, and now law following equity, regards the land as money. So much for that point.

Then the final point was whether the section of the Act applied; and really it is only necessary, assuming conversion to have taken place, to look at the Act to see that it does apply. I see no reason to doubt that s. 38, sub-s. 2 (*c*), of the Act of 1881 applies to property of this description. My judgment, therefore, must be for the Crown.

CAVE, J. I agree with the judgment that has been delivered, and for the reasons which my brother has given.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitor for defendant: *C. J. Rawlinson.*

(1) 12 App. Cas. 672. (2) Law Rep. 5 Ex. 102.
(3) Law Rep. 9 Ex. 29.

A. P. P. K.

KLEINWORT, SONS & CO. *v.* COMPTOIR NATIONAL D'ESCOMPTE DE PARIS.

1894
April 12, 18.

Trover—Conversion—Crossed Cheque—Banker collecting and handing over Proceeds.

The payee of a crossed cheque specially indorsed it to the plaintiffs and posted it to them. A stranger, having obtained possession of the cheque during the course of transmission, obliterated the indorsement to the plaintiffs, and, having substituted a special indorsement to himself, presented it at the defendants' bank, and requested them to collect it for him. They did so, and handed the money over to him.

In an action for conversion by the plaintiffs:—

Held, that the defendants were liable for the amount of the cheque.

ACTION tried before Cave, J., without a jury.

Joseph Walton, Q.C., and *F. W. Hollams*, for the plaintiffs.

Bigham, Q.C., and *J. A. Hamilton*, for the defendants.

The facts and arguments sufficiently appear from the judgment.

Cur. adv. vult.

April 18. CAVE, J. In this case the plaintiffs sue to recover the proceeds of a crossed cheque, which had been specially indorsed in their favour and forwarded to them by post from Barcelona, but which was presumably stolen in the course of transmission. Four days after it was posted, a stranger, representing himself to be Federico Sanromá, went to the defendants' bank at Paris, and, producing the cheque, which at the time bore the name of Federico Sanromá as special indorsee in place of that of the plaintiffs (which had been obliterated), and which also bore the indorsement of Federico Sanromá, requested them to forward the cheque to their agents in London and collect it for him, which they did; and, on receiving a telegram from their agents that the draft had been honoured, they paid the amount to the stranger in Paris. The plaintiffs were the bankers of José Monégal y Nogués, the payee of the cheque; and, not having received the cheque, they did not credit the payee with it.

For the defendants, it was contended that there was no sufficient

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KLEINWORT, SONS & CO. v. COMPTOIR NATIONAL D'ESCOMPTE DE PARIS.

Cave, J.

proof that the indorsement was fraudulently altered after the letter was posted; but, as a matter of fact, I find that it was so altered.

The next contention was that the delivery to the post-office was not a delivery to the plaintiffs; but this, also, I find against the defendants.

It was further contended that the plaintiffs were not entitled to sue, inasmuch as they were not damnified. I am, however, of opinion that, as there was a good indorsement and delivery, the plaintiffs acquired a good title, and could maintain this action in their own names against a wrongdoer or person without any title.

Lastly, it was submitted that there was no conversion by the defendants; and the cases of *Arnold* v. *Cheque Bank* (1) and *Fine Art Society* v. *Union Bank of London* (2) were cited. Particular stress was laid upon Lord Coleridge's judgment in the former case, in which he says (p. 585): "The question here is, whether what was done by the defendants amounted to a conversion of the bill; and we are of opinion that it did. Payment of the drafts was actually obtained by the defendants from Smith, Payne, & Smith; and the next step in dealing with the money was not simply to hand it over to Mrs. Chandler, but to retain it and open an account with her, the effect of which was to appropriate it to their own use as a loan from Mrs. Chandler." It was contended that in this case the defendants simply handed over the money to Federico Sanromá, and did not open any account with him. But, in my judgment, Lord Coleridge only made use of the expressions relied on in answer to the objection that the bank got nothing by the transaction. I do not think it is necessary to shew that the bank made any profit by the transaction, although in fact in this case they did make a charge for it. It is clear from the *Fine Art Society's Case* (2) that the defendants, in presenting the draft and obtaining the money, were guilty of a conversion, inasmuch as they presented it and obtained the money, not for the plaintiffs, but for the stranger, who handed them the draft, and who had no title whatever to it.

This consideration also answers another contention of the

(1) 1 C. P. D. 578. (2) 17 Q. B. D. 705.

defendants, viz., that the case is governed by French law, inasmuch as the defendants handed over the money to the stranger in Paris. There having already been a conversion in London, when the amount of the draft was received from the bankers on whom it was drawn, what took place afterwards in Paris could not affect the defendants' position. As soon as the defendants received the money in London, they received it to the use of the plaintiffs; and it cannot possibly affect their liability that afterwards, on the receipt of a telegram from their London agents, they handed over the equivalent of the money received in London to the stranger in Paris. There must be judgment for the plaintiffs for the amount of the draft with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Hollams, Sons, Coward & Hawksley.*
Solicitors for defendants: *Lyne & Holman.*

A. P. P. K.

PATTEN *v.* THE WEST OF ENGLAND IRON, TIMBER, AND CHARCOAL COMPANY, LIMITED.

1894
May 4.

Arbitration—Costs—Taxation—Costs of Reference—Cause referred for Trial—Special Referee—Costs of Reference included in Costs of Action—Order XXXVI., *r.* 50.

An order of reference referred the whole cause to a special referee for trial under Order XXXVI.

The referee awarded that nothing was due from the defendants to the plaintiff, and directed and awarded that the defendants recover against the plaintiff the costs of the action and of the award:—

Held, that the costs of the reference were included in the costs of the action, and therefore the defendants were entitled to recover against the plaintiff the costs of the reference.

APPEAL by the defendants from the order of Lawrance, J., at chambers, reversing the order of the master, and disallowing the costs of a reference.

An order was made by a master "that the whole of this cause be tried before Mr. George Bryant Sully, J.P., of Bridgwater, shipping agent, who shall have all the powers of certifying and amending of a judge of the High Court of Justice, and shall

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direct judgment to be entered, and otherwise deal with the whole action, pursuant to Order XXXVI." (1)

The special referee made his award as follows:—

"I do hereby award, certify, and report that there is nothing due from the defendants to the plaintiff in this action. And I hereby direct and award that the defendants recover against the plaintiff the costs of the action and of this my award."

The master's reply to the plaintiff's objections to taxation was as follows:—

"The order of reference in this case referred the whole cause to a special referee for trial under Order XXXVI. I find that the practice of the official referees in cases so referred to them is to make no distinction between costs of the action and costs of the reference, treating themselves as officers of the Court, and as such trying an action and not a reference. The same principle seems to apply to a special referee—see Arbitration Act, s. 15, sub-ss. 1 and 2. (2) In my view, therefore, the costs of the reference are included in the costs of the action which have been awarded to the successful party by the special referee."

The master accordingly allowed the costs of the reference to the defendants, and the judge reversed this order.

J. D. Crawford, for the defendants, in support of the appeal. The order of the master was right, and ought to be restored. The learned judge appears to have been under the impression that the costs of the reference were not included in the costs of the action; but this is a misapprehension, for by Order XXXVI.,

(1) Order XXXVI., r. 50: "Subject to any such order as last aforesaid, the referee shall have the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a judge of the High Court."

(2) By the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 15: "(1.) In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the Court or a judge may direct.

"(2.) The report or award of any official or special referee or arbitrator on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury."

r. 50, the special referee is placed in the position of a judge, with full discretion over the costs of the proceedings, and according to both the old and the present practice the costs of the reference are included in an award giving the costs of the action to either party. [He was stopped.]

Hextall, for the plaintiff. The order appealed from is right. It is true that the referee had a discretion as to dealing with costs, and he has exercised that discretion by directing the plaintiff to pay the costs of the action and of the award, omitting the costs of the reference, which it must be taken were purposely omitted. It is true that the case of *In re An Arbitration between Walker & Son and Brown* (1) decided that costs of the award were included in costs of the reference; but there is no converse case deciding that costs of the reference are included in costs of the award or costs of the action. [He also referred to *Fearon* v. *Flinn* (2); *Galatti* v. *Wakefield* (3); *In re Autothreptic Steam Boiler Co.* (4)]

CHARLES, J. The order of reference in this case referred the whole cause to a special referee for trial under Order XXXVI., r. 50, and therefore the special referee was in the position of a judge. The special referee gave an award, by which he awarded, certified and reported that there was nothing due from the defendants to the plaintiff in the action; and he thereby directed and awarded that the defendants recover against the plaintiff the costs of the action and of the award. The defendants now seek to tax the costs of the reference as part of the costs of the action. The master held that the defendants were entitled to tax those costs; but the judge was of opinion that the defendants were not so entitled, and reversed the order of the master. I agree with the view adopted by the master. A special referee tries an action. He is in a position analogous to that formerly occupied by an arbitrator under the old practice, where the reference was compulsory, though it was otherwise where the reference was by consent. It follows therefore that the special referee is in the position of a judge, and has full discretion as to

(1) 9 Q. B. D. 434.
(2) Law Rep. 5 C. P. 34.
(3) 4 Ex. D. 249.
(4) 21 Q. B. D. 182.

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Charles, J.

the costs of the proceedings before him. In the present case he has given the costs of the action to the defendants, and in my opinion this includes the costs of the reference. I observe that the master's statement as to the practice of the official referees is in accordance with the opinion which I have expressed in the present case.

For the reasons which I have given I have arrived at the conclusion that the order made by the judge at chambers must be set aside, and the order of the master restored.

COLLINS, J. I am of the same opinion. Order XXXVI., r. 50, distinguishes between "reference" and "trial." In the present case the whole cause was sent to the special referee, and therefore there was a trial, and in my opinion the costs of the trial include the costs of the reference.

Appeal allowed.

Solicitor for plaintiff: *Edgar Bogue, for Tweed, Honiton.*

Solicitors for defendants: *Church, Rendell, Todd, & Co., for Densham & Row, Bampton.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1894
April 14.

IN RE W. HOLLOWAY (A SOLICITOR). EX PARTE PALLISTER.

Practice—"Originating Summons"—Solicitor—Summons for delivery up of Client's Papers—Order LV., *r.* 4; *Order* LV., *r.* 3; *Order* LXXI., *r.* 1—*Order as to Supreme Court Fees*, 1884—*Rules of Supreme Court, November*, 1893, *Order* LIV., *rr.* 4 *B*, 4 *C*, 4 *D*, 4 *E*; *Order* LIV. *A*.

By Order LXXI., r. 1, an "originating summons" means "a summons by which proceedings are commenced without writ":—

Held, that this definition means a summons by which proceedings, which under the old practice would have been commenced by bill in Chancery or by writ, are commenced without a writ.

Consequently, a summons calling upon a solicitor to deliver up his client's papers is not an "originating summons," and it is sufficient if it is served two clear days before the day appointed for hearing, and it is not necessary that an appearance should be entered to it.

APPEAL against the refusal of a Divisional Court (Mathew and Cave, JJ.) to discharge an order, made by a master and affirmed by Grantham, J., in chambers, for the delivery up of certain deeds and papers by W. Holloway, a solicitor, to the solicitors of John Pallister, the applicant.

Holloway had formerly acted as solicitor for Pallister, and had in his possession deeds and papers belonging to Pallister. The summons upon which the order was made was entitled only "In the High Court of Justice, Queen's Bench Division. In the matter of William Holloway, one of the solicitors of the Supreme Court." The material part of the summons was as follows: "Let all parties concerned attend the master in chambers at the Central Office, Royal Courts of Justice, &c., on Wednesday, the 31st of January, 1894, &c., on the hearing of an application on the part of John Pallister, &c., that the above-named William Holloway do, within four days after service of the order to be made hereon, deliver up on oath to Messrs. Leesmith & Munby, solicitors for the applicant, all deeds, papers, and writings whatsoever in his custody or power belonging to the applicant." The summons was dated January 27, 1894, and was served on Holloway the same day. It was stamped with a 3*s*. stamp. The summons was heard by the master on January 31. Holloway did not attend, and in his absence the master made an order in the

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terms of the summons. Grantham, J., varied the order by limiting it to documents connected with one action, as to which the solicitor had given an undertaking to deliver them up. Holloway appealed to the Divisional Court, and by his notice of appeal he asked that the order might be discharged, on the ground that it "was wrongfully obtained, by reason of the summons upon which it was made not bearing its proper stamp, or being issued as an originating summons, and not being duly served pursuant to the Rules of Court."

The Divisional Court affirmed the order of Grantham, J.

Holloway appealed.

H. Newson, for the appellant. This summons was an "originating summons" within the meaning of the Rules of the Supreme Court. It comes within the definition of an "originating summons," contained in r. 1 of Order LXXI. of the Rules of the Supreme Court, 1883. (1) By it, "proceedings are com-

(1) By the Rules of the Supreme Court, 1883, Order LIV., r. 4: "An originating summons, where service is necessary, shall be served seven clear days before the return thereof. Every other summons shall be served two clear days before the return thereof, unless in any case it shall be otherwise ordered."

Order LV. relates to "Chambers in the Chancery Division," and r. 3 provides that the persons therein named "may take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, &c."

By Order LXXI., r. 1: "In the construction of these rules, unless there is anything in the subject or context repugnant thereto, the several words hereinafter mentioned or referred to shall have or include the meanings following (inter alia): 'Originating summons' means a summons by which proceedings are commenced without writ."

By the Order as to Supreme Court Fees, 1884, the following fees (inter alia) are prescribed:—

	£	s.	d.
7. "On sealing or issuing an originating summons under the Act 6 & 7 Vict. c. 73, for the taxation of a solicitor's bill of costs within twelve months after delivery, or delivery of a bill of costs by a solicitor, including the order to be made thereon	10	0	
8. "On sealing any other originating summons ..	10	0"	
10. "On sealing or issuing a summons for directions under Order XXX. ..	10	0	
11. "On sealing or issuing any other summons, or Taxing Master's warrant	3	0."	

By the Rules of the Supreme Court, November, 1893, Order LIV., r. 4 B:

menced without writ." Therefore, by the Rules of November, 1893, the respondent is entitled to eight days within which to enter an appearance.

The stamp is also insufficient. It should have been a 10*s.* stamp. The proceedings are irregular, and the order ought to be set aside.

"An originating summons shall be in the Form No. 1 A, B, C, or D, Appendix K, with such variations as circumstances may require. It shall be prepared by the applicant or his solicitor, and shall be sealed in the Central Office, or in Admiralty matters in the Admiralty Registry, and when so sealed shall be deemed to be issued. The person obtaining the summons shall leave at the Central Office, or Admiralty Registry, as the case may be, a copy thereof, which shall be filed and stamped in the manner required by law."

Rule 4 C: "The parties served with an originating summons shall, before they are heard, enter appearances in the Central Office, or in Admiralty matters at the Admiralty Registry, and give notice thereof. A party so served may appear at any time before the hearing of the summons. If he appears at any time after the time limited by the summons for appearance he shall not, unless the Court or a judge shall otherwise order, be entitled to any further time for any purpose, than if he had appeared according to the summons."

Rule 4 D: "The day and hour for attendance under an originating summons shall, after appearance, be fixed by notice, sealed with the seal of the Central Office, in the case of a summons issued in the Queen's Bench Division, or of the chambers of the judge to whom such summons is assigned in the case of a summons issued in the Chancery Division, or of the Admiralty Registry in the case of Admiralty matters. Such notice shall be in Form No. 1 F, Appendix K. The notice shall be served on the defendant or respondent by delivering a copy thereof at the address for service named in the memorandum of appearance of such defendant or respondent not less than four clear days before the return day."

Rule 4 E: "Every summons, not being an originating summons, shall be served two clear days before the return thereof, unless in any case it shall be otherwise ordered. Provided that in case of summonses for time only, the summons may he served on the day previous to the return thereof."

By Order LIV. A: "(1.) In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested. (2.) The Court or a judge may direct such persons to be served with the summons as they or he may think fit."

The forms of originating summons given in Appendix K require the person to whom the summons is addressed "within eight days after service of this summons on him, inclusive of the day of such service," to "cause an appearance to be entered for him to this summons."

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Tindal Atkinson, Q.C., and *Howland Jackson*, for the client. This form of summons has always been adopted in a case of this kind. It is issued either under s. 37 of the Solicitors' Act of 1843 (6 & 7 Vict. c. 73), or under the inherent summary jurisdiction of the Queen's Bench Division over its own officers. At any rate, it is not an "originating summons." It is an ordinary summons and rule 4 E of Order LIV. applies. It was properly served and properly stamped. Every "originating summons" commences proceedings without a writ; but it does not follow that every summons which commences proceedings without a writ is an "originating summons." An "originating summons" applies only to cases in which it would formerly have been necessary to commence proceedings by a writ. The proceedings in the present case have been quite regular.

H. Newson, in reply.

LORD ESHER, M.R. No doubt there are some difficulties, contradictions, and discrepancies to be found in the rules; they arise from the infirmity of human language. But I think no one who considers the matter fairly can entertain any doubt in this case as to the intention. The definition in Order LXXI. of the term "originating summons" is not a very happy one. It would, I think, have been better to say that an "originating summons" is that mode of commencing an action by summons which is now allowed instead of commencing it by a writ. That is really what is meant; and no one who reads the rule with a fair mind and a knowledge of the previous practice could doubt that that was the intention. At the time when the Rules of 1883 were made the term "originating summons" had already become well known in the Chancery Division. It was found that the old mode of commencing a suit in the Court of Chancery by a bill gave many opportunities for delay and expense, and in order to avoid this delay and expense the system was devised of a summons originating proceedings in chambers, which in the course of time came to be called an "originating summons." This procedure was invented for the purpose of quickly determining simple points. When these "originating summonses" had been used for some years in the Court of Chancery and the Chancery

Division, it was decided to extend them to the other Divisions of the High Court, and, though I agree that there is some difficulty in the language used, yet I think that the subject-matter shews conclusively, and, indeed, the legal sense of every lawyer will admit, that the real meaning of the definition of an "originating summons" is, a summons by which an action may be commenced otherwise than by writ. If this be so, the present summons is not an "originating summons," and none of the rules which govern the procedure in the case of an "originating summons" apply. The practice relating to such a summons remains as it has been for years, and the notion that an appearance must be entered by a person who is served with an ordinary summons, and that eight days must be allowed for his appearance has no foundation. There has been no irregularity in the present case, and, in my opinion, the appeal should be dismissed with costs.

LINDLEY, L.J. I feel no doubt that this summons is not an "originating summons." No one could have thought that it was but for the language of the definition in Order LXXI. The argument for the appellant is based on the theory that every summons which "originates" any proceedings is an "originating summons." That, however, is not so. The term "originating summons" came into use some time after the passing of the Chancery Procedure Act of 1852 (15 & 16 Vict. c. 86). Before that Act the ordinary mode of commencing proceedings in the Court of Chancery was by "bill." There were, indeed, even then certain proceedings which could be commenced in another way viz., by petition. The procedure was under the General Orders of the Court of Chancery of April, 1850, simplified by the introduction of "claims," a "claim" being a short "bill," without interrogatories, applicable to simple cases. The procedure was still further simplified by the Act of 1852. Sects. 45 and 47 of that Act and the Orders made under it authorized in certain cases the commencement of what was really a suit in Chancery by a summons originating proceedings in chambers. This was the origin of the term "originating summons." What, then, was an "originating summons" at that time? It was a method of commencing proceedings in Chancery by a summons in chambers instead of by bill. At the time when the Judicature

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Act was passed there were two kinds of summonses in use, an ordinary summons and an "originating summons," the latter being used in the Court of Chancery in certain cases instead of a bill. The Rules of the Supreme Court of 1875 did not affect the practice of the Chancery Division as regarded originating summonses. The rules were re-cast in 1883, and then the term "originating summons" was for the first time introduced into the Judicature Rules and defined. The term, however, had not lost its original meaning. It still meant a summons which originated proceedings in Chancery, the summons being substituted for a writ in a suit or an action, which had by the Judicature Act taken the place of a suit. The number of cases in which proceedings in the Chancery Division could be commenced by "originating summons" was very much increased by the Rules of 1883; but from 1883 down to November, 1893, no one ever dreamt that a summons in any Division of the High Court to tax a solicitor's bill or to compel him to deliver up papers to his client was an "originating summons," except that in the order as to Supreme Court Fees of 1884 the fee of 10*s.* is prescribed "on sealing or issuing an originating summons, under the Act 6 & 7 Vict. c. 73, for the taxation of a solicitor's bill, or delivery of a bill of costs by a solicitor." How it was that the term "originating summons" came to be used there, I do not know. Then came the Rules of November, 1893, one object of which was to extend the Chancery procedure by originating summons in certain cases to the Queen's Bench and Admiralty Divisions, in which Divisions that procedure had been up to that time unknown. That extension was effected by Order LIV. A, and if that Order is read first, there will be no difficulty in construing Rules 4 B. 4 C. and 4 D. of Order LIV. It is because of Order LIV. A that the words "Queen's Bench Division" and "Admiralty Division" are introduced into those Rules. But the meaning of the term "originating summons" remains precisely the same as it was before; it has not been altered by the Rules of 1893 any more than by the Rules of 1883, and the argument for the appellant can only be maintained by taking advantage of the unfortunate obscurity in the language of Order LXXI. In my opinion the decision of the Divisional Court was quite right.

LOPES, L.J. I agree.

KAY, L.J. I am of the same opinion. Summonses may be classed under three heads: (1.) Summonses issued in a pending action. No one would dream of calling these "originating." (2.) Summonses to originate proceedings in the nature of an action which may be used in certain cases instead of a writ. No one would call these summonses anything but "originating." The 3rd class includes such summonses as the present—a summons upon a solicitor to deliver up documents belonging to his client. It is not a summons in an action. It does no doubt originate proceedings against the particular solicitor. It is a summons under either the statutory or the general jurisdiction of the Court to order a solicitor to deliver up to his client documents which he has undertaken to deliver up. It is not issued in any pending proceeding, and it does not commence an action. In my opinion, the term "originating summons," as defined in Order LXXI., does not include such a summons as this. An "originating summons" means only a summons by which proceedings are commenced which must formerly have been commenced by a bill or a writ. The proceedings in this case have, therefore, been quite regular.

A. L. SMITH, L.J. The argument for the appellant must go to this extent, that every summons which is not issued in an action already pending is an "originating summons" within the meaning of the rules. The argument is based upon the language of the definition contained in Order LXXI. Having, however, regard to the previous practice, I read the definition as meaning—an "originating summons" is a summons by which proceedings are commenced which formerly could not have been commenced without a writ or a bill.

DAVEY, L.J. I am of the same opinion, and for the reasons which have been stated by my learned brethren.

Appeal dismissed.

Solicitors: *W. Holloway; Leesmith & Munby.*

W. L. C.

1894
April 21.

[CROWN CASE RESERVED.]

THE QUEEN *v.* BLABY.

Criminal Law — Practice — Previous Conviction — Misdemeanour — Uttering Counterfeit Coin — Indictment for Felony—The Coinage Offences Act, 1861 (24 & 25 *Vict. c.* 99), *ss.* 9, 12, 37.

By 24 & 25 Vict. c. 99, s. 9, a person who utters counterfeit coin is guilty of a misdemeanour, "and being convicted thereof" is liable to imprisonment. By s. 12, a person who has been convicted of a misdemeanour under s. 9, and afterwards commits a misdemeanour mentioned in that section, is guilty of felony, "and being convicted thereof" is liable to penal servitude. By s. 37, a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence is made sufficient evidence of the previous conviction.

Held, that the expression "convicted," as used in ss. 9 and 12, must be taken to refer only to the finding of a verdict of guilty or a plea of guilty, and not to include the sentence or judgment of the Court; and that, therefore, upon the trial of an indictment for felony under s. 12, a previous conviction under s. 9 was sufficiently proved by the production of a certificate which shewed that the prisoner had been released upon finding a recognizance to come up for judgment when called upon.

CASE stated by the Common Serjeant of London.

The prisoner was tried for feloniously uttering counterfeit coin upon an indictment under 24 & 25 Vict. c. 99, s. 12, which, after charging her with the misdemeanour of unlawfully uttering a counterfeit coin in 1894, proceeded to charge her with a previous conviction in 1888 for a similar offence, and concluded in the usual form, that the prisoner had feloniously uttered the counterfeit coin on the second occasion. She was given in charge to the jury upon the first part of the indictment only, which charged the unlawful uttering in 1894; to this charge she pleaded guilty. She was then given in charge upon the second part of the indictment, charging the previous conviction, to which she pleaded not guilty. A police officer was called who stated that he was present in court when the prisoner was convicted, and produced a certificate of her conviction, from which it appeared that she had been released upon finding a recognizance to come up for judgment when called upon. The prisoner's counsel thereupon submitted that, in order to con-

stitute a conviction, there must be both verdict and judgment; that the certificate shewed that no judgment had been pronounced against the prisoner, but only an order made empowering her to be released upon finding a recognizance to come up for judgment, and that there was, therefore, no case to go to the jury. The Common Serjeant overruled the objection, and the jury found that the prisoner was the person named in the certificate.

The question for the Court was whether the prisoner could properly be convicted of felony.

Burnie, for the prisoner. The conviction for the felony was bad, for the certificate was defective for the purpose for which it was used in not shewing that there had been a judgment. "Conviction" includes judgment or sentence: *Burgess* v. *Boetefeur* (1), which is distinguished, though not in terms dissented from, by Stephen, J., in *Jephson* v. *Barker*. (2) Lord Hale, in dealing with a statute of Elizabeth which made a subsequent offence a felony, says (3): "By conviction I conceive is intended not barely a conviction by verdict, where no judgment is given, but it must be a conviction by judgment."

[HAWKINS, J. Admitting that the word "conviction" may be used in two senses, can there be any doubt that it is here used in the sense of "verdict," and that judgment is something apart from and following on conviction? And is not a prisoner who pleads guilty called upon as having been convicted upon his own confession?]

Being an equivocal word, it should be strictly construed. If conviction includes judgment, the certificate must state the judgment given; otherwise it would be consistent with the certificate that judgment had been arrested: *Reg.* v. *Ackroyd* (4); *Reg.* v. *Stonnell*. (5) The judgment appearing in the certificate must be the final judgment, for there is no such thing as an interlocutory judgment in the criminal law. Here it is obvious

(1) 7 M. & G. 481; 13 L. J. (M.C.) 122.
(2) 3 T. L. R. 40.
(3) Hale's Pleas of the Crown, vol. i. p. 685.
(4) 1 C. & K. 158.
(5) 1 Cox, 142.

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from the certificate that there had been no judgment pronounced against the prisoner in respect of the prior offence.

H. Sutton, and *Partridge*, for the prosecution, were not called upon.

The judgment of the Court (Lord Coleridge, C.J., Hawkins, Mathew, Cave, and Grantham, JJ.) was delivered by

HAWKINS, J. We have no difficulty in holding that this conviction should be affirmed, and on this simple ground: that upon carefully considering the language of ss. 9 and 12 of the Coinage Offences Act, 1861, there can be no doubt of the meaning of the word "convicted" as there used; it appears plain that it is not necessary that there should be a judgment before there can be a conviction. Taking s. 9, it is evident that such "conviction" means the finding of the jury that the person charged is guilty; after making the uttering of counterfeit coin a misdemeanour, the section proceeds, "and being convicted thereof"—that is, found guilty of the misdemeanour—"shall be liable to be imprisoned," &c. From the language used it is as clear as anything well can be that the intention of the legislature in this section was that the finding of the jury that the accused was guilty should be treated as a conviction; "convicted" meant "found guilty," and the sentence was to follow on the conviction. And a plea of guilty would equally be a conviction. In the present case it clearly appears from the certificate that the prisoner had been found guilty of a misdemeanour; the certificate is sufficient to shew that beyond question; and it is conceded that no judgment was pronounced. There is no mention of any in the certificate.

Now we come to the further charge in the indictment, which is that of having committed a second offence after having been so convicted; that is framed under s. 12, which creates a new offence, and turns that which under s. 9 is only a misdemeanour into a felony. The prisoner in this case pleaded guilty to the charge of having committed an offence of a character which under s. 9 would, had the case been one of a first conviction, have been only a misdemeanour; and, to make out that this offence was committed after a previous conviction, a certificate

of the previous conviction was put in. No question arises as to its admissibility, and it clearly shews that the prisoner had been previously convicted in the sense I have indicated, the result being that a previous conviction under s. 9 has been proved against the prisoner, and that she has pleaded guilty under s. 12 to a similar offence; she is, therefore, directly within the meaning of s. 12, and is guilty of felony. When the sections are carefully read, the question seems to all of us to be beyond all argument.

Conviction affirmed.

Solicitor for prosecution: *Solicitor to the Treasury.*
Solicitor for prisoner: *T. O. Evans.*

W. J. B.

[CROWN CASE RESERVED.]

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April 21.

THE QUEEN *v.* SOWERBY.

Criminal Law—False Pretences—Sufficiency of Indictment.

An indictment for obtaining, or attempting to obtain, money by false pretences must contain averments stating the person to whom the false pretence was made, and the person from whom the money was obtained or attempted to be obtained.

The form of indictment in *Reg.* v. *Hunter* (10 Cox, 642) held bad.

CASE stated by the chairman of the quarter sessions for the county of Durham.

The defendant was arraigned upon an indictment for attempting to obtain money by false pretences, which was in the following terms: "The jurors for our Lady the Queen, upon their oath, present that William Marr and Obadiah Blenkinsopp, on September 28, 1893, were in the employ and service of the Butterknowle Colliery Company, Limited, at the Quarry pit of the Butterknowle Colliery, in the county of Durham, as hewers of coal, and were entitled to payment from their said employers of the sum of fivepence for every tub of coal wrought and filled by them, and the jurors aforesaid, upon their oath aforesaid, do further present that Joseph Sowerby, the younger, on the day and year aforesaid, unlawfully, knowingly, and designedly did, by placing a token upon a certain tub of coals in the said pit,

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falsely pretend that the said Joseph Sowerby, the younger, had wrought and filled the said tub of coals, by means of which said false pretences the said Joseph Sowerby, the younger, did unlawfully attempt to obtain the sum of fivepence of the moneys of the said colliery company with intent to defraud, whereas in truth and in fact the said Joseph Sowerby, the younger, had not wrought or filled the said tub of coals, as he then well knew, against the form, &c."

Defendant's counsel submitted that the indictment was bad upon two grounds: first, that it was not stated to whom the false pretence was made, and, secondly, that it was not stated from whom the money was attempted to be obtained. The chairman was of opinion that the indictment contained sufficient particulars of the offence charged, and overruled the objection. The defendant thereupon pleaded not guilty to the indictment, and was tried by a jury, who returned a verdict of guilty. Sentence was postponed, and the prisoner liberated on bail.

The question for the opinion of the Court was whether the indictment was good and sufficient in law, and whether the defendant was lawfully found guilty upon it.

John Strachan, for the defendant. The indictment is bad. The usual form of an indictment for obtaining money by false pretences is given in *Rex* v. *Douglass* (1); it must state the person to whom the pretence was made, and the person from whom the money was obtained; here both averments are wanting.

[GRANTHAM, J. Do not the facts stated in the indictment shew an attempt to obtain money from the colliery company?]

No; the averment that the money was the money of the company is an immaterial averment, and cannot supply the place of an averment that the money was obtained from them. It is true that this indictment is similar to the one in *Reg.* v. *Hunter* (2); but in that case the objection was not taken.

No counsel appeared for the prosecution.

LORD COLERIDGE, C.J. I am of opinion, though I should have been glad in this particular case to be able to come to an

(1) 1 Camp. 212. (2) 10 Cox, 642.

opposite conclusion, that this conviction must be quashed. We must follow the old authorities and precedents in criminal matters, and no case can be found which says that an indictment for obtaining money by false pretences, which does not state the person to whom the false pretence was made, is a good indictment. A pretence means a holding out to some other person, and that person must be stated in the indictment. The old precedents also contain the averment "by means of which false pretence he obtained from" the prosecutor, &c.; but in the present indictment this averment also is omitted. On that short ground I think it safer to quash the conviction. There is a form, nearly a hundred years old, for these indictments, which every lawyer may know, and I do not understand why it should not be followed; the result of not following it here is that two averments are omitted which are essential parts of the charge. It is true that the indictment contains an averment that the money was the property of the company; but the statute makes that averment unnecessary, and a necessary averment cannot be supplied by an averment which need not be there, and without which the indictment would be good.

HAWKINS, MATHEW, CAVE, and GRANTHAM, JJ., agreed.

Conviction quashed.

Solicitors for defendant: *Field & Roscoe, for Maw, Teale, & Thomlinson, Bishop Auckland.*

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April 21.

[CROWN CASE RESERVED.]

THE QUEEN *v.* DYSON.

Bankruptcy—Offences—Undischarged Bankrupt—"Obtaining Credit"—Intent to Defraud—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 31—*Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 18.

By the Bankruptcy Act, 1883, s. 31, "Where an undischarged bankrupt who has been adjudged bankrupt under the Act obtains credit to the extent of twenty pounds or upwards from any person, without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour":—

Held, that an intent to defraud is not a material ingredient of the offence created by the section.

CASE stated by the chairman of the quarter sessions for the West Riding of Yorkshire.

The defendant was tried upon an indictment under s. 31 of the Bankruptcy Act, 1883, charging him with having obtained credit to the extent of 20*l.* and upwards from Isaac Naylor without informing the said Isaac Naylor that he was an undischarged bankrupt. (1)

It was proved at the trial that the defendant had been duly adjudged a bankrupt in 1885, and had never obtained his discharge; that he had carried on business since his bankruptcy, and that in May and June, 1892, goods to the value of 103*l.* and 126*l.* respectively were purchased upon credit by him from Isaac Naylor, which goods were delivered to him upon credit, and kept by him without any payment being made for them; that at no time did he inform Isaac Naylor that he was an undischarged bankrupt, and that Naylor was not at the time when either of the credits was obtained aware of such fact.

It was proposed by the defendant's counsel to put questions

(1) By 46 & 47 Vict. c. 52, s. 31: "Where an undischarged bankrupt, who has been adjudged bankrupt under this Act, obtains credit to the extent of twenty pounds or upwards from any person without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869, and the provisions of that Act shall apply to proceedings under this section."

to the witnesses for the prosecution with a view to shew that, although the credits had been obtained by the defendant without giving any information that he was an undischarged bankrupt, and without Naylor having been aware of the fact, such credits had been obtained without any intent to defraud, and he submitted that, if that could be shewn, the defendant would be entitled to an acquittal. On behalf of the prosecution it was objected that an intent to defraud was not an ingredient of an offence under s. 31 of the Bankruptcy Act, 1883, which was complete upon proof that the defendant had obtained credit to the extent of 20*l.* without giving the information specified in the section. The Court was of opinion that, for the purpose of determining whether or not an offence under the section had been committed, it was immaterial to consider whether the credit had been obtained with or without an intent to defraud, and ruled that questions proposed to be put only with a view to shew an absence of an intent to defraud could not be put, and directed the jury upon the question of fraudulent intent in accordance with that opinion. The jury convicted the defendant.

The question for the Court was whether the above-mentioned ruling and direction were right or wrong. If the Court was of opinion that the defendant should have been allowed to cross-examine with a view to shew that in obtaining the credits he had no intent to defraud, and that the jury should have been directed to acquit the defendant if satisfied that in obtaining the credits he had no such intent, the conviction was to be quashed; otherwise, it was to be affirmed.

R. W. Harper, for the defendant. The conviction was wrong; an intent to defraud is a necessary ingredient of the offence. By s. 31 of the Bankruptcy Act, the provisions of the Debtors Act, 1869, are to apply to proceedings under that section; the effect of this is to incorporate s. 18 of that Act, which provides that where a person is charged before justices with a misdemeanour under the second part of that Act, they are to consider any evidence adduced before them tending to shew that the act charged was not committed with a guilty intent.

[MATHEW, J. The absence of any defined punishment in s. 31

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of the Bankruptcy Act shews the object of its last clause, which provides that the offender may be "dealt with and punished" as if he had been guilty of a misdemeanour under the Debtors Act, and therefore makes the provisions of that Act applicable to proceedings under s. 31.]

The effect of the incorporation is to make it incumbent upon the tribunal before which a person is tried, under s. 31 of the Bankruptcy Act, to give the same effect to the absence of a guilty intent that justices are bound to give to it by s. 18 of the Debtors Act; in other words, an intent to defraud is made a necessary ingredient of an offence under s. 31. The language used in the judgment in *Reg.* v. *Peters* (1) is in the defendant's favour; there the section was held to apply to a man "who obtains goods and does not pay for them for a substantial period of time"; and non-payment for a substantial period can only be material as shewing an intent to defraud, which is therefore an ingredient of the offence.

Löwenthal, for the prosecution, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this conviction should be affirmed. The indictment is framed under s. 31 of the Bankruptcy Act, 1883, which says that an undischarged bankrupt, who obtains credit to the extent of 20*l.* without informing the person from whom he obtains it that he is an undischarged bankrupt, is guilty of a misdemeanour. The defendant did, as the jury have found, obtain credit to a larger amount without disclosing the fact of his being an undischarged bankrupt, and the whole of the requirements of the section appear to have been satisfied. A passage in the judgment in *Reg.* v. *Peters* (2) has been cited as being in the prisoner's favour; but the Court was there dealing with a very different question, the argument for the then defendant being based on the distinction between cash and credit transactions. Of course, the question may arise in a particular case whether the transaction was a cash transaction or not; but we are precluded from going into that question in the present case, for there is a clear finding of a purchase upon credit by the defendant, by which it is obvious that the magistrates

(1) 16 Q. B. D. 636, at p. 641. (2) 16 Q. B. D. 636.

mean that he obtained credit for the goods. Having obtained credit to the extent of 20*l.* without giving the required information, the defendant has, whether or not he had an intent to defraud, done all that was necessary to bring himself within the section. I cannot doubt that the magistrates were right.

HAWKINS, J. I am of the same opinion, and can entertain no doubt. The defendant comes within the very words of s. 31, which says nothing as to an intent to defraud. On referring to the Debtors Act, 1869, I have been struck with the fact that the offences created by that Act are created by sections in which the words "fraudulently" or "unless the jury shall be satisfied that there has been no intent to defraud," or equivalent words, are used. In framing the Act of 1883, the legislature had the provisions of the Act of 1869 before them, and it is impossible to suppose that they were unaware of the importance of limiting the offence to cases where there has been an intent to defraud and excluding those cases where the jury might think there had been no such intent; if an intent to defraud was to be a necessary ingredient of the offence, apt words to that effect would have been introduced into the section. As it is, the section creates the offence if an undischarged bankrupt obtains credit without intimating the fact of his position to the person from whom he obtains it.

MATHEW, J. I agree. This is an ingenious attempt to incorporate s. 18 of the Debtors Act, 1869, with s. 31 of the Bankruptcy Act, 1883, and to read the latter as though it contained the proviso in the former, to the effect that justices are to take into consideration any evidence adduced before them to shew that the act charged was not committed with a guilty intent. But that is clearly not the way in which the section should be read. The proviso in s. 18 of the Debtors Act is a direction to justices to give effect to the evidence mentioned in the section; it does not apply to the trial of the defendant upon indictment, its object being to enlarge the discretion of justices, having regard to their discretion under the Vexatious Indictments Act.

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CAVE, J. I am of the same opinion. The question of intent does not arise at all under this section.

GRANTHAM, J. I agree.

Conviction affirmed.

Solicitor for the prosecution: *Solicitor to the Treasury.*
Solicitors for defendant: *Van Sandau & Co.*

W. J. B.

1894
May 4.

COLE *v.* ELEY.

Solicitor—Lien—Charging Order—Assignment of Judgment Debt—Priority—Notice of Solicitor's Right to a Lien—"Purchaser for Value without Notice"—Solicitors Act, 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.

A solicitor had acted for the plaintiff in an action, which was compromised on certain terms as to payment by instalments, judgment being given for the plaintiff. The plaintiff then assigned for valuable consideration the money payable to him under the compromise to a person who had been a witness in the action. It was not proved that express notice of the solicitor's claim was given to the assignee:—

Held, that the provision in s. 28 of the Solicitors Act, 1860, avoiding conveyances to defeat a charging order, "unless made to a bonâ fide purchaser for value without notice," means, without notice of the solicitor's right to a lien, and not, without notice of the existence of a charging order, that the assignee of the judgment debt, being aware of the existence of the action, and that the solicitor was acting in it for the plaintiff, must be taken to have had notice of the solicitor's right to a lien on the property recovered in the action, and therefore was not a "purchaser for value without notice," within the meaning of the Act, and the solicitor was entitled to a charging order.

Faithfull v. *Ewen* (7 Ch. D. 495) followed.

Hough v. *Edwards* (1 H. & N. 171) questioned.

APPEAL from the order of Lawrance, J., at chambers, making absolute an order nisi for a charging order, under s. 28 (1) of the Solicitors Act, 1860 (23 & 24 Vict. c. 127), on the

(1) By 23 & 24 Vict. c. 127, s. 28: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding, in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the

money recovered in the action of *Cole* v. *Eley*, in favour of Mr. W. M. Baker, who had acted as solicitor for the plaintiff in that action. The action was compromised on the terms that a certain sum should be paid down, and further sums by instalments, and judgment was given for the plaintiff accordingly. The plaintiff, Cole, then assigned to a person named Read, who was a witness in the action, the money payable to the plaintiff by the terms of the compromise. Read gave notice to Baker, the solicitor, of the assignment to himself, and the solicitor thereupon applied for and obtained the charging order which was the subject of the present appeal. It was not proved that the solicitor had given any express notice to Read of his claim.

Horace Kent, for Read, in support of the appeal. The charging order is invalid as against the rights of the assignee of the debt, for the assignment was "made to a bonâ fide purchaser for value without notice," within the meaning of 23 & 24 Vict. c. 127, s. 28. These words mean, without notice of the charging order, and here, as the charging order was not made or applied for until after the assignment, the assignee could not have had notice, and is protected. This must be the meaning of the Act, for otherwise it is difficult to apply any meaning to the words. Mere knowledge of the existence of the action cannot be treated as sufficient notice. *Hough* v. *Edwards* (1) is a strong authority in favour of the appellant's contention. In *Birchall* v. *Pugin* (2), where the claim of the solicitor prevailed, he had taken the first step. *Faithfull* v. *Ewen* (3), being an administration suit, is a different case from the present, and moreover in that case the mortgagees were themselves parties to the suit.

[COLLINS, J. *Faithfull* v. *Ewen* (3) was acted upon by the

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same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; . . . and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right."

(1) 1 H. & N. 171.

(2) Law Rep. 10 C. P. 397.

(3) 7 Ch. D. 495.

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Court of Appeal in *Shippey* v. *Grey* (1), which was not the case of an administration suit.]

Crispe and *Hawtin*, for Baker, the solicitor who had obtained the charging order. Read, having been a witness in the action of *Cole* v. *Eley*, had notice of the existence of the action, and further than this it is obvious that he knew that Mr. Baker acted as solicitor for the plaintiff, and that the property which was the subject of the assignment was recovered in the action by the solicitor's exertions, and therefore he had notice that the solicitor had a right to a lien on that property. That this is sufficient notice is clear from *Faithfull* v. *Ewen*. (2) *Hough* v. *Edwards* (3) is inconsistent with *Haymes* v. *Cooper* (4), *Faithfull* v. *Ewen* (2), and *Shippey* v. *Grey* (1), the two last of which cases are decisions of the Court of Appeal. It is clear therefore that Read is not "a bonâ fide purchaser without notice," within the meaning of the Act, and his title cannot prevail.

[CHARLES, J. It seems impossible to reconcile the decisions in *Shippey* v. *Grey* (1) and *Hough* v. *Edwards*. (3)]

That would shew that the decision in *Hough* v. *Edwards* (3) is not law, and, further, there is the distinction between that case and the present, that *Hough* v. *Edwards* (3) was before the Solicitors' Act, 1860, and therefore was not the case of a charging order.

[CHARLES, J., referred to *Pilcher* v. *Arden*, *In re Brook* (5), and COLLINS, J., to *Brunsdon* v. *Allard*. (6)]

The following cases were also referred to: *Sympson* v. *Prothero* (7); *Emden* v. *Carte* (8); *Greer* v. *Young* (9); *Dallow* v. *Garrold* (10); *In re Suffield and Watts, Ex parte Brown* (11); *Ross* v. *Buxton* (12); *Price* v. *Crouch*. (13)

CHARLES, J. This case is somewhat perplexing, but we have arrived at a determination, and I do not see that any object is to be gained by postponing our decision. The contest is between

(1) 49 L. J. (Q.B.) 524.
(2) 7 Ch. D. 495.
(3) 1 H. & N. 171.
(4) 33 Beav. 431.
(5) 7 Ch. D. 318.
(6) 2 E. & E. 19.
(7) 26 L. J. (Ch.) 671.
(8) 19 Ch. D. 311.
(9) 24 Ch. D. 545.
(10) 13 Q. B. D. 543; affirmed 14 Q. B. D. 543.
(11) 20 Q. B. D. 693.
(12) 42 Ch. D. 190.
(13) 60 L. J. (Q.B.) 767.

a solicitor, who has obtained a charging order upon money recovered by his exertions, and a person who has bought for valuable consideration a judgment debt. The order of events was as follows: First, there was judgment for the plaintiff in the action of *Cole* v. *Eley*, in which Mr. Baker acted as solicitor for Cole. Then, secondly, there was an assignment for value from Cole to Read of the judgment debt. Then, thirdly, Mr. Baker obtained the charging order which is the subject of the present appeal. The question as to the bona fides of Cole and Read was not raised before the judge at chambers, nor, I think, could it have been raised on the affidavits as they stand. Therefore we must take it that there was a judgment, and a bonâ fide purchase of the judgment debt by Read, before the charging order was obtained. The question for our decision is whether this charging order should be upheld. I have come to the conclusion that it should, and that the order nisi was rightly made absolute. The rights of the parties do not depend altogether on the Act of Parliament, although the right of the solicitor to a charging order does depend entirely on the Act. A solicitor has a lien for his costs from the date of the judgment. The question is, what is his position with regard to rights which have accrued before the charging order was made? The Act provides by s. 28 that "all conveyances and acts done to defeat, or which shall operate to defeat," the charging order, "shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against" the charging order. The first question is, where the Act speaks of "without notice," what is meant? Without notice of what? If the Act is read strictly, it would at first sight seem to mean without notice of the charging order. But on a fuller consideration of the statute, and of the rights of the parties, I have come to the conclusion that it must be taken to mean notice of the solicitor's right to a lien on the proceeds of the judgment. It follows therefore that the fact of the date of the assignment being prior to the date of the charging order is not decisive in favour of the assignee. It is clear in the present case that Read had notice of the solicitor's right to a lien. It may be that he had no express notice, but the question is whether he was in the position of a person who had actual

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notice that the right to a lien existed? In my opinion the authorities are decisive that he had notice, for he knew that he was buying a judgment debt. Suppose this had been the case of a fund in court. It is plain that in such a case the assignee would be treated as having notice. That this is so is shewn by the judgment of Sir John Romilly, M.R., in *Haymes* v. *Cooper* (1), where he said, "If the statute had not passed, I should not have had any doubt on the subject, but this Act declares the Court shall have power to declare that the solicitor is entitled to a charge for his costs, and that all conveyances to defeat it, unless to a bonâ fide purchaser for value without notice, shall be void. My opinion is that where a man knows that there is a fund in Court, he knows also that it is subject to the solicitor's lien for his costs in recovering it, and that he is entitled to be paid in the first instance. The Act, however, clearly points out that there may be a bonâ fide purchaser who may have priority. As to that I express no further opinion than this, that the present is not such a case, for Mr. Cooper had notice of the lien of the solicitor." The Master of the Rolls there treats the fact of there being a fund in Court as amounting to notice of the existence of the solicitor's lien. The next question is whether the same considerations apply to the case of a judgment debt? My first impression was that they did not apply, for it struck me that the case of *Hough* v. *Edwards* (2) would have been decided otherwise than it was if those considerations did apply. I was also impressed with the remark made in argument that the words of the Act would have no meaning if the view were adopted which is favourable to the right to the charging order. However, on full consideration of the cases, I have come to the conclusion that the decision of the Court of Appeal in *Faithfull* v. *Ewen* (3) leaves no alternative open to us in the present case except to decide in favour of the solicitor's right to a charging order. In that case the plaintiffs in a suit mortgaged their interests in the estate, the subject matter of the suit, to two of the defendants. The mortgage was sent to the plaintiffs' solicitor for his perusal and approval, and he sanctioned their executing it, nothing

(1) 33 Beav. 431. (2) 1 H. & N. 171.
(3) 7 Ch. D. 495.

being said about the solicitor's claim for costs. The solicitor afterwards obtained a charging order on the plaintiffs' interests. The Court of Appeal, consisting of James, Baggallay, and Thesiger, L.JJ., held that, as the mortgagees had notice of the suit, they must be presumed to have known the rights of the solicitor of the plaintiffs, and that his charge ought not to be postponed to the mortgage. In delivering the judgment of the Court, Baggallay, L.J., said, "It is insisted on behalf of the respondents that, inasmuch as Mr. Brook" (the solicitor) "was cognisant of the arrangement under which the defendants Ewen and Clark were about to advance their money, and did not in any way assert his rights under the statute, though he had every opportunity of doing so, he must be treated as having waived them in favour of the defendants. We are unable to adopt this view. The defendants Ewen and Clark and their advisers were of course aware of the pending suit, and they must have known, or must be presumed to have known, the rights which the solicitor of the plaintiffs was entitled to under the statute." (1) That judgment treats knowledge of the existence of the suit as knowledge of the solicitor's lien. It is urged on behalf of the appellant in the present case that *Faithfull* v. *Ewen* (2) was a case of an administration suit, and the facts are different here. But *Faithfull* v. *Ewen* (2) was relied on in *Shippey* v. *Grey* (3), where the contest was somewhat similar in its character to that in the present case. There the plaintiffs in the issue were solicitors for a person named Washington in an action in which he recovered a sum of money. The defendant in the issue was a judgment creditor of Washington, and obtained ex parte a garnishee order attaching all debts due to Washington. On learning of this the plaintiffs gave notice to the defendants in the action in which Washington was plaintiff of their claim to a lien, and afterwards applied for a charging order. The Court of Appeal held, affirming the judgment of the Divisional Court, that the plaintiffs in the issue had a lien for their costs, and were entitled to a charging order, and the garnishee order had not priority. Counsel for the appellant cited *Hough* v. *Edwards* (4),

(1) 7 Ch. D. at p. 498.
(2) 7 Ch. D. 495.
(3) 49 L. J. (Q.B.) 524.
(4) 1 H. & N. 171.

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which did decide that the claim of the garnishee must prevail as against the general lien of the solicitor; but the counsel for the solicitors (now Collins, J.) relied on *Faithfull* v. *Ewen* (1) (which had already been referred to by Baggallay, L.J.), and the Court acceded to his contention. Bramwell, L.J., said, "I think that this appeal must fail, on the ground that the case is concluded by the decision of this Court in *Faithfull* v. *Ewen.* (1) That decision is in point, and we cannot overrule it." (2) Baggallay and Brett, L.JJ., the latter of whom was a party to the decision in *Birchall* v. *Pugin* (3), also relied on *Faithfull* v. *Ewen* (1) as an authority in point. It is clear therefore that *Faithfull* v. *Ewen* (1) was acted on as an authority in *Shippey* v. *Grey.* (4) The conclusion at which I have arrived is that we have no alternative on the authority of the three cases of *Haymes* v. *Cooper* (5), *Faithfull* v. *Ewen* (1), and *Shippey* v. *Grey* (4), except to decide that in the present case the solicitor is entitled to a charging order, and that the appeal must be dismissed.

To avoid the possibility of any misunderstanding, I will add a direction that any portion of the judgment debt which may have been received by the solicitor must be applied solely in respect of the costs in the action of *Cole* v. *Eley*, and not in respect of any antecedent debts.

COLLINS, J. I am of the same opinion. The solicitor before the charging order was granted had a right to a lien on the fund recovered in the action of *Cole* v. *Eley*, and the question to be decided is whether that right can be defeated by the sale of the judgment debt by Cole to Read. It is clear that it cannot, unless the sale was "made to a bonâ fide purchaser for value without notice." The point then is, did Read, the purchaser of the judgment debt, take the assignment with notice of the solicitor's right to a lien? I am of opinion that this point is concluded by the authority of the decision of the Court of Appeal in a case which has been already referred to—*Faithfull* v. *Ewen.* (1) That case, in effect, decides that notice that the subject-matter of the assignment is the subject-matter of a suit

(1) 7 Ch. D. 495.
(2) 49 L. J. (Q.B.) at p. 526.
(3) Law Rep. 10 C. P. 397.
(4) 49 L. J. (Q.B.) 524.
(5) 33 Beav. 431.

amounts to notice to the assignee of the existence of the solicitor's right to a lien. The cases which have been referred to as to garnishees at first sight seemed to raise a difficulty; but on the authority of *Faithfull* v. *Ewen* (1) it is obvious that the law must be as I have stated. The cases which create that difficulty are *Hough* v. *Edwards* (2) and *Birchall* v. *Pugin* (3), in which latter case the fact of the solicitor having taken the first step appears to have been relied on in the judgments. In my opinion the cases as to garnishee orders may be explained by a doctrine that lies at the root of the rights of a judgment creditor who has obtained a garnishee order, namely, that he takes no more than the rights of the debtor. This doctrine is illustrated by the judgment of Willes, J., in *Hirsch* v. *Coates* (4), where he said: "I think this statute" (the garnishee clause of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, s. 61)), "must be construed like any other statute, giving its words their plain ordinary and proper sense. So construing it, I think it can only operate to give the judgment creditor the same degree of charge upon the debts which are the subject of the order as an assignment in bankruptcy would give—such as the judgment debtor was entitled to at law and in equity." The same view was again expressed by the same learned judge in the case of *Pickering* v. *Ilfracombe Ry. Co.* (5), where he said: "The last point is that notice to Lord Poltimore was necessary, and none was given. That turns upon this, whether the 61st section of the Common Law Procedure Act, 1854, intended to give the garnishee something more than the debtor himself was entitled to. But, as was pointed out by Mr. Mellish, there is no such language in the Act." Then, after referring to an exception to the general rule that the creditor can have no more than the debtor was entitled to, which was said to exist with regard to another statute, he continued: "But upon the construction of the 61st section of the Common Law Procedure Act, 1854, I think the defendants have failed to shew that any such exception was intended to apply to this case." This view was followed by the Court of Appeal in *Badeley* v. *Consolidated Bank* (6), where Cotton, L.J.,

(1) 7 Ch. D. 495.
(2) 1 H. & N. 171.
(3) Law Rep. 10 C. P. 397.
(4) 18 C. B. 757, at p. 764.
(5) Law Rep. 3 C. P. 235, at pp. 250, 251.
(6) 38 Ch. D. 238.

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said: "But it was said that the plaintiff had allowed Smith to deal with that which was comprised in the security in such a way as to enable greater benefit to be obtained by the garnishee orders than otherwise would have been obtained. He had not given notice to the railway company. He had left the bonds and other property in the hands of Smith. Well, we have not heard Mr. Rigby upon that point; but assuming that he had, then in my opinion that will not enable Wallis by means of a garnishee order to get a greater right as against this property than he would otherwise be entitled to. In my opinion his rights under the garnishee order were only to attach that which could properly, and without violation of the rights of other persons, be dealt with by Smith. Smith had already assigned all his claims against the railway company to the plaintiff. That was a security otherwise unimpeachable, and in my opinion Mr. Wallis under his garnishee order cannot establish any claim in derogation of the rights which the plaintiff had under his security." (1) It was held in that case that an equitable charge, obtained before the garnishee order, took priority of the order, though no notice of the charge had been given. It is possible that under certain circumstances a purchaser, if he can shew that he is a bonâ fide purchaser for value without notice, may stand in a better position than a judgment creditor who has obtained a garnishee order. I am of opinion that the decision in *Faithfull* v. *Ewen* (2) concludes the present case. The money payable under the judgment is the fruits of the action of *Cole* v. *Eley*, and there is primâ facie evidence of notice to Read, the assignee, of the solicitor's right to a lien. Read's affidavit does not disclaim notice, but on the contrary practically admits it, and under those circumstances he cannot properly be said to be a bonâ fide purchaser for value without notice. The charging order therefore was rightly made, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *F. Norton.*

Solicitors for respondent: *Montagu Scott & Baker.*

(1) 38 Ch. D. at pp. 256, 257. (2) 7 Ch. D. 495.

P. B. H.

[IN THE COURT OF APPEAL.]

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Jan. 17, 22; *March* 12, 13, 15; *April* 12.

IN RE AN ARBITRATION BETWEEN THE LONDON COUNTY COUNCIL AND THE LONDON STREET TRAMWAYS COMPANY.

Tramway—Purchase of Undertaking by County Council—Terms of Purchase—Valuation of Tramway—London Street Tramways Act, 1870 (33 & 34 *Vict. c. clxxi.*), *s.* 44.

By s. 44 of the London Street Tramways Act, 1870 (which corresponds to s. 43 of the Tramways Act, 1870 (33 & 34 Vict. c. 78)), it is provided that the Metropolitan Board of Works may, after the expiration of twenty-one years from the passing of the Act, by notice in writing require the London Street Tramways Company to sell to them their undertaking upon the terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials and plant of the company, such value to be in case of difference determined by a referee nominated by the Board of Trade. The London County Council, who had succeeded to the powers of the Metropolitan Board of Works, gave notice under the foregoing section to purchase the company's undertaking:—

Held, reversing the decision of the Divisional Court, that the value of the tramway upon a compulsory sale to the county council must be measured by what it would cost to construct it at the date of such sale, subject to a proper deduction in respect of depreciation.

MOTION, on behalf of the London Street Tramways Company, to set aside, or send back to the arbitrator, an award made by Sir Frederick Bramwell, Bart., determining the sum to be paid by the London County Council for the purchase by them of the tramways, works, and undertaking of the company.

The company was incorporated, and authorized to construct and lay down street tramways in the metropolis, by a special Act, the London Street Tramways Act, 1870 (33 & 34 Vict. c. clxxi.).

In 1891 the county council gave notice in writing to the company, under s. 44 of that Act, that they required the company to sell to them the tramways, works, and undertaking authorized by such Act, and the arbitrator was duly appointed under ss. 44 and 46 to determine the value of such tramways, works, and undertaking. (1)

(1) 33 & 34 Vict. c. clxxi. s. 44, enacts that: "The Metropolitan Board of Works may . . . within six months after the expiration of a period

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In the course of the proceedings before the arbitrator differences arose as to the mode in which the value of the tramways, works, and undertaking ought to be ascertained, and those differences were recited in his award as follows:—

"And whereas in the course of the proceedings before me the tramways company proposed to tender evidence of the actual profits made by them from traffic on the purchased tramways, and stated that the object of such evidence was to arrive at the value of the tramways by taking a certain number of years' purchase of the profits to be shewn by such evidence, and the county council gave notice of objection to such evidence, on the ground that, having regard to the terms of the London Street Tramways Act, 1870, the referee was prohibited from taking past profits into consideration for the purpose aforesaid, and I refused to receive such evidence on the ground that the terms of the said Act, and of the instrument by which I was appointed referee, did not authorize or permit me to adopt a method of valuation based on years' purchase of profits:

"And whereas in the subsequent course of the said proceedings the tramways company tendered evidence to shew the rental

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of twenty-one years from the passing of this Act . . . with the approval of the Board of Trade, by notice in writing require the company to sell, and thereupon the company shall sell to them their undertaking, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever,) of the tramway, and all lands, buildings, works, materials and plant of the company suitable to and used by them for the purposes of their undertaking, such value to be, in case of difference, determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party . . . and when any such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking sold . . . shall be transferred to, vested in, and may be exercised by the Metropolitan Board of Works in like manner as if that board had been authorized by this Act to construct the tramways, and had been named in this Act instead of the company."

The language of s. 44 of the special Act, as here set forth, follows, mutatis mutandis, that used in the Tramways Act, 1870 (33 & 34 Vict. c. 78), s. 43, a general Act enabling a local authority to purchase from the promoters of a tramway their undertaking.

The powers, duties, and liabilities of the Metropolitan Board of Works were transferred to the London County Council by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40.

value of the purchased tramways considered as let, or capable of being let, to a tenant, and stated that the object of such evidence was to arrive at the value of the purchased tramways, 'exclusive of any allowance for past or future profits of the undertaking,' within the meaning of the 44th section of the London Street Tramways Act, 1870, and the county council objected to such evidence, but I admitted the same, subject to such objection as might be taken on its being shewn by cross-examination, or further evidence, that the proposed mode of arriving at a value by means thereof involved an allowance for past or future profits of the undertaking; and, on such evidence and cross-examination being completed, and such objection taken, I have abstained from taking such evidence into consideration in arriving at the value hereby awarded, on the ground that the mode of valuation to which such evidence was directed involves an allowance for past or future profits within the meaning of the said section:

"And whereas the county council tendered evidence to shew the opinion of expert witnesses as to the proper cost of construction of the purchased tramways, and the depreciation of such value, by comparing the condition at the time of sale and purchase with the condition when newly constructed, and stated that the object of such evidence was to arrive at the value on the basis of cost, less depreciation; and the tramways company objected to such evidence on the ground that evidence of the cost of construction, either with or without depreciation, was inadmissible for the purpose of ascertaining the value according to the true intent and meaning of s. 44 of the London Street Tramways Act, 1870; but I admitted such evidence as giving information which I might properly take into consideration in determining the value within the meaning of the said section under the circumstances aforesaid," &c.

After further recitals, which it is unnecessary for the purposes of this report to set forth, the award proceeded: "I determine and award that the sum of 64,540*l.* is the value of the purchased tramways and the works thereof, exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory purchase, or other consideration whatsoever, except the consideration of the value to the tramways company,

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or to the county council, measured by what it would cost either the tramways company or the county council to establish the purchased tramways if such tramways did not now exist, but taking into account a proper deduction in respect of depreciation."

The notice of motion asked for an order to set aside the award, or to remit it to the arbitrator, on the grounds, first, that the arbitrator ought to have taken into consideration the evidence given on behalf of the company as to the rental value of the purchased tramways as let, or as capable of being let, to a tenant; second, that the arbitrator was wrong in excluding evidence of the profits made by the company from the traffic on the purchased tramways; third, that the evidence given on behalf of the council of the cost of construction of the purchased tramways, either with or without depreciation, was inadmissible for the purpose of ascertaining the value of the purchased tramways according to the true intent and meaning of the 44th section of the London Street Tramways Act, 1870, and such evidence ought not to have been admitted or taken in consideration by the arbitrator.

Sir R. E. Webster, Q.C., and *Cripps, Q.C.* (*Henry Sutton*, with them), for the London Street Tramways Company, in support of the motion.

Finlay, Q.C., and *G. M. Freeman*, for the London County Council, contrà.

The arguments are sufficiently stated in the judgments of the Queen's Bench Division. (1) In addition to the cases mentioned in those judgments, *Elston* v. *Rose* (2) and *Dobbs* v. *Grand Junction Waterworks Co.* (3) were referred to during the argument.

Cur. adv. vult.

1894. Jan. 22. The following judgments were delivered:—

MATHEW, J. This is a motion to set aside, or to send back, an award made under s. 44 of 33 & 34 Vict. c. clxxi. The arbi-

(1) Post, pp. 196, 198. (2) Law Rep. 4 Q. B. 4.
(3) 9 App. Cas. 49.

trator was appointed to determine the price at which the London County Council, in succession to the Metropolitan Board of Works, was to take over certain tramways belonging to the London Street Tramways Company, and in the course of the arbitration a dispute arose as to the meaning of s. 44, and as to the mode in which the value of the undertaking was to be ascertained. The company contended that the value was to be arrived at in the ordinary way with reference to such undertakings—namely, by arriving at the rental and capitalizing it. The London County Council, on the other hand, contended that, according to the true meaning of the section, the value was to be ascertained by arriving at the cost of construction, less depreciation. The amount in dispute, representing the difference between the two modes of ascertaining the value, is very large, and the case is one of great and general importance. The differences which arose before the arbitrator are set forth in the recitals in his award in the following terms. [The learned judge read the recitals as set forth. (1)] The award, therefore, contains a clear statement of what the contention on each side was, and of the course taken by the arbitrator. The question for us is, whether the arbitrator was right in rejecting the evidence offered by the company, and acting upon the evidence tendered by the London County Council. We have to ascertain the meaning of s. 44, which is certainly not easy to construe. It does not provide that the company shall relinquish their undertaking to the county council; the phraseology is very different, and is this: "The Metropolitan Board of Works" (now the London County Council) "may require the company to sell, and thereupon the company shall sell to them, their undertaking." The word "sell" is important. It implies buying and selling, and buying implies equality of consideration. If the county council be right here, the company is selling a great deal more than the county council buy, and there is no equality in the transaction. The section goes on, "upon terms of paying the then value" (I omit for the moment the words between brackets) "of the tramways." Now, "pay" obviously, as it seems to me, means pay for what had been sold; and "value" means value to the

(1) Ante, pp. 190, 191.

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vendors. "Tramway" is defined by s. 3 of this Act to mean "tramway and undertaking." The phrase "undertaking" is, therefore, used twice over. The company are to sell the undertaking, and to be paid the then value of the tramway, meaning the tramway and the undertaking, "and," the section proceeds, "all the lands, buildings, works, materials, and plant of the company." Passing by the words in brackets, and supposing them not in the section, what would be the meaning of that provision? It is said on behalf of the tramways company that the meaning is obvious; that the word "value" has a well-ascertained meaning in connection with statutory directions of this sort; that "value" is to be ascertained as it would have to be ascertained for rating purposes, and that the word must be construed in that sense. These tramways are hereditaments, capable of earning profits, and assessable under the Poor Law Acts. That is clear from the case of *Pimlico Tramway Co.* v. *Greenwich Union* (1), which has been called to our attention, and the meaning which I have indicated of the word "value" is recognised in many statutes in pari materiâ—as for instance, in the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 4, and also in the Union Assessment Acts. To get at the value of the hereditament, you take the profits, deduct the tenant's charges and reasonable profits, and what is left is the rent which would be paid by a tenant for the opportunity of earning his profit. By capitalizing that rental you arrive at the value of the hereditament in question. This mode of ascertaining value will be familiar to all lawyers, and it is unnecessary to dwell upon it further. It was pointed out during the argument that in arriving at the value of lands and buildings—a duty also cast upon the arbitrator here—you cannot proceed in any other way; you cannot arrive at the value of land or buildings without ascertaining what rent a tenant would pay for one and the other, and it was contended on behalf of the tramways company that that was the governing intention of the legislature in s. 44. On the other hand, it was said for the London County Council, that in attributing that intention to the legislature you are passing by the words in brackets which form the most important and the governing part of the whole section. Those words, which are in

(1) Law Rep. 9 Q. B. 9.

parenthesis, are not, it was said, words qualifying, but words contracting, those which go before. That is certainly not the ordinary function of a parenthesis. It was contended that those words prohibit the arbitrator from arriving at the value by means of rental. The words are: "Exclusive of any allowance for past or future profits of the undertaking, or any compensation"—that is, exclusive of any allowance for compensation—"for compulsory sale or other consideration whatsoever." It is necessary to analyze those words. First, let us suppose that the words "for past or future profits of the undertaking" were omitted, and the clause ran, "exclusive of any allowance for any compensation for compulsory sale or other consideration whatsoever." It would then be quite clear that "allowance" there meant an addition—i.e., that in order to ascertain the value, you are not to add the ordinary percentage allowed for compensation for compulsory sale or similar consideration whatsoever. That would be all intelligible, and all entirely consistent. Next, take the words "exclusive of any allowance for past or future profits." If the words ran, "exclusive of any allowance for future profits," the whole sentence would be consistent, because it would mean exclusive of any addition for future profits. But it is said that because the words "past profits" are found in the clause, the whole meaning of the section is altered, and this result is introduced—namely, that in estimating the value you are to take only structural cost, minus depreciation. The argument is that to estimate rental involves an allowance in respect of past and future profits which is prohibited by the section; but it seems to me that, if that construction be correct, "allowance" must be used in a different sense in connection with past profits than the sense in which it is used with reference to compensation, and you are construing the section as if some such word as "estimate" had been used instead of "allowance." I cannot come to the conclusion that it was ever intended that the words in brackets should entail such consequences as are insisted upon by the county council. The use of the words "past profits" in that connection would entail a mode of estimating value that has never before occurred to the mind of any reasonable person in connection with undertakings of this sort.

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The contest on each side stands thus: The company, on the one hand, invite us to look at the whole terms of the section; not to suppose that this parenthesis is the potential part of it, and not to rely on the use of the phrase "past profits" having so potential and drastic a meaning as is suggested by the county council. The company contend that the "then" value is to be ascertained without looking to the past or to the future; that the present earnings must be taken, and it must be assumed that those earnings were made in the past and will be made in the future; that the then value must be so ascertained, and no addition must be made to the value so ascertained by adding any compensation for compulsory sale, or by making any allowance—that means making no addition in respect of any allowance—for past or future profits of the undertaking. The use of the word "then" certainly suggests the interpretation put on the entire section by the tramway company as being the correct one.

On the other hand, the county council contend that it was intended by the Act of Parliament to grant a concession for twenty-one years to the company, and parliament was free to enact that, at the end of that time, there should be a complete confiscation of what the company had, or a partial confiscation. It is said that parliament has declared that there shall be a partial confiscation, and that is the result of the section. If that be the result of the section, it is extraordinary. In the first place, the legislature has not said so, and, in the second place, to suppose that that is what was meant is to suppose that the legislature used language which, it seems to me, is calculated to mislead. The Act was intended to inform such of the public as were disposed to become shareholders in this kind of undertaking, and one would expect plain language addressed to such persons and their advisers as to what the legislature meant. If it meant to inform the public, "You shall not have, at the end of twenty-one years, compensation for the value of the undertaking, but your undertaking shall be sold for the cost of the materials in situ, less depreciation," I cannot help thinking that very few tramways would have been constructed, because a shareholder proposing to take shares has to satisfy himself that the profits of the undertaking would not only pay him interest upon

his investment, but would restore to him wholly or partially, at the end of twenty-one years, his capital. Profits must not only involve payment of interest to a shareholder, but also the creation of a sinking fund to indemnify him in respect of his investment. I think very few shareholders would invest in undertakings of this kind if their position at the end of twenty-one years was to be that suggested by the argument of the county council.

Before the view of the county council can be adopted in this case, we must be satisfied that parliament meant what the county council say it did. Certainly there is no indication of any such meaning on the face of s. 44. At any rate, there is no clear indication, and nothing would have been easier than to have said in terms that at the end of the twenty-one years there should be a transfer of the undertaking, and the company should be paid for the cost of materials in situ capable of being worked, less depreciation. That is not the language used, but the language which we are asked to infer. Counsel for the company were asked to say what meaning they attributed to this parenthesis. That question has been answered. It must be borne in mind that this section deals not only with the undertaking in situ—the working undertaking which is earning profits—but it also provides for the transfer of the undertakings mentioned in the two preceding sections, and those sections apply, one to the case of a tramway which has ceased to be worked, and the other to the case of an insolvent tramway company. It may very well be that the legislature intended that, in estimating the value of a tramway which had ceased to be worked, the council should not be called upon to pay anything in respect of profits which had been earned years before, and so again in the case of an insolvent company. Another suggestion, which seems to me reasonable, was made in argument with respect to the possible intention of the legislature. In inquiries of this sort to ascertain value or compensation, it is sometimes suggested that all the profits have not been divided, but that some of the profits have been invested, judiciously or injudiciously, in the undertaking, and the legislature may well have desired that an inquiry of this sort should not be protracted by an investigation into the

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fact of whether all the profits have or have not been distributed in the past, or whether part of the profits have been injudiciously or judiciously invested as capital expenditure. Either of those suggestions seems to me to explain the phraseology of this part of the section which is contained in the brackets, and not to be inconsistent with the position which the company have taken up in this matter; and I, therefore, am of opinion that the award must go back, and that the question of valuation must be dealt with in accordance with what I have stated in my judgment as right. At the same time, we are not to be supposed to say what the rental figure is, or how the rental figure ought to be arrived at, nor do we presume to say for how many years that rental should be capitalized. Those are all matters for the arbitrator.

COLLINS, J. I am of the same opinion. We are called upon to decide which of the two contentions put before us is the right one. The view taken by the arbitrator in arriving at the value of the tramways is thus stated in his award: "I award that the sum of 64,540*l.* is the value of the purchased tramways and the works thereof . . . measured by what it would cost either the tramways company or the county council to establish the purchased tramways if such tramways did not now exist, but taking into account a proper deduction in respect of depreciation." The tramways company say that that mode of arriving at the value is wrong; that the tramways are hereditaments, and that the value ought to be arrived at in the same manner and on the same principles (which are familiar to everybody who has had to deal with rating cases) as the value of a hereditament is arrived at for the purpose of rating. There is this element of difficulty in the case—that we cannot derive as much assistance from a comparative view of what would be a complete compensation or an incomplete compensation as may be derived in other cases; because, whatever be the true view of s. 44, the conditions were ascertained and determined by the Act of Parliament when the tramways company itself came into existence. We are not called upon to construe an Act passed after the tramways company came into existence, determining on what conditions it is to cease to exist. We have to construe an Act which determines

those conditions at one and the same time as the tramways company is authorized to have its existence. Therefore, whatever is the true view of the terms and conditions of this section, the company must be taken to have had notice of them, and to have formed itself in view of its possible extinction thereafter under those terms and conditions. Having regard, however, to the words of the section and the scheme of the Act it is, I think, tolerably clear what the legislature intended. The tramways company came into existence on the terms that, after the expiration of twenty-one years, the Metropolitan Board of Works (for which the county council is now substituted) might acquire their undertaking. The question is, whether on that acquisition they are to pay, not for the whole thing acquired, but for a part of the whole thing acquired, and, if so, what part. Of course, it was competent for the legislature to have confiscated absolutely the whole of the undertaking of the company. It was also possible for them to pass the whole of it on to the county council, whilst not imposing on the county council the payment for more than a part of it. The question is, have they done so? or, to what extent have they done so? It seems to me that the most material consideration in the matter is what the tramways company is to be taken to sell by the terms of this section. Is it to be taken as selling only the plant and materials in situ, or is it to be taken as selling the whole undertaking—that is, the plant and materials and the right to use them? That appears to me to be the crucial question, because that was the governing distinction upon which the case referred to in argument—*In re Kirkleatham Local Board* v. *Stockton and Middlesborough Water Board* (1)—was decided. There the words had to be construed which the legislature uses when it does intend that the thing sold and the thing paid for shall be the materials and not the right to use them. The water board had, under the power of an Act of Parliament, acquired the whole undertaking of a water company; but there was a provision that when the outlying districts, within the prescribed area, chose themselves to supply their own water, they should be at liberty to acquire the pipes and

(1) [1893] 1 Q. B. 375; [1893] A. C. 444, sub nom. *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board.*

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fittings belonging to the board at a price to be fixed, in default of agreement, by arbitration. It was held that the proper price to be paid was a price practically arrived at on the same principle as that upon which the arbitrator in this case has arrived at the price to be paid to the tramways company. But the ground of decision was that the buying authority there had in its own right under the Public Health Act, 1875, the right to supply water in its district, and all that it wanted, and all that the legislature intended it to take, was the pipes through which, when it had got them, it had by virtue of its own existence a right to pass the water. In that view, the legislature said, "You shall have the thing you want on paying, not the value, but the price." That, as was pointed out in argument here, was the ground put most distinctly by A. L. Smith, L.J., in the Court of Appeal for the decision. Here, under s. 44, what the company are required to sell is the undertaking, and what they are to be paid is "the then value"—leaving out the words between brackets—"of the tramway, and all lands, buildings, works, materials and plant of the company suitable to and used by them for the purposes of their undertaking." Then follows this provision: "When any such sale has been made, all the rights, powers, and authorities of the company in respect to the undertaking sold . . . shall be transferred to, vested in, and may be exercised by" the Metropolitan Board of Works, now the London County Council. The scheme, therefore, is that, by virtue of a sale the London County Council shall take over the entire undertaking, with all the powers thereto annexed, as if they were the original constructors. That what is intended to be sold is not merely the materials in situ, but the right attached to those materials is, I think, made more clear by reference to s. 46, which enables the company, six months after it has begun to work, to sell their undertaking to any person, corporation, &c., "and when any such sale has been made, all the rights, powers, authorities, obligations, and liabilities of the company in respect to their undertaking shall be transferred to, vested in, and may be exercised by and shall attach to" the persons buying them.

It is clear that, on the sale contemplated by that section, the company are empowered to sell their whole undertaking with

the rights thereto attached. The legislature declares that, when the sale takes place, the buyers shall have all the rights and authorities that the tramways company theretofore had, and uses precisely the same language in dealing with a sale not under s. 44, but a sale by the company for its own benefit, and in defining the thing sold and what shall follow on the sale, as it does in s. 44. I therefore think it is clear that what the company is selling in this case is not what the board was taken to be selling in the *Kirkleatham Case.* (1) Here the company was selling the thing, with the right to use the thing; and in the *Kirkleatham Case* (1) the board was selling the thing only, because it was selling to an authority which had, aliunde, by its own right, the right to use the thing bought in a particular way, and therefore ought not to be, and could not be, called upon to pay anything for that right. In the case before us the company is selling to a body who have not the right, aliunde, to use the thing sold, but who derive that right from the Act and the Act only. If what is sold is not merely the thing, but the right to use the thing, we are carried a long way in determining what ought to be paid for it. I adopt the argument in full which my brother Mathew has used in interpreting s. 44. Having dealt with the question, What is the thing sold, the next question is, What is to be paid for it? It is, "The then value of the tramway, and all lands, buildings, works, materials, and plant, exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever." Now, inasmuch as this company came into existence with the knowledge that at the end of twenty-one years it might be called upon to cease to exist, it would, I think, be fair enough that any sum for compensation as for a compulsory sale should not be paid, because it came into existence on the condition that it should never have any right to be paid anything for compulsorily ceasing to exist. It may also be fair that, inasmuch as the company knew that at some time or other there would be a term fixed beyond which it could not go on earning profits, it ought not to be paid for the loss of the possibility

(1) [1893] 1 Q. B. 375; [1893] A. C. 444, sub nom. *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board.*

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of earning more profits. But when you have said that, it seems to me that the equities of the case are exhausted, and that it is fair to give the company the then value of the thing sold, measured in the ordinary way in which the value of a hereditament is measured—namely, by reference to what could be made by the use of it, supposing you were measuring the value to the owner, who was not himself to become a trader and make trade profits. It seems to me that the word "then" is of very great importance in dealing with the question of what is the meaning of "allowance for past or future profits of the undertaking." To begin with, I adopt the argument that has been put before us on behalf of the company, that when you get a something to be valued exclusive of something else, primâ facie, but for the exclusion, the thing excluded would be taken into the subject-matter of the value; but if the contention of the county council is correct—namely, that the thing to be valued is simply the materials in situ—profits would have no place in the discussion; profits would not require to be excluded because they were not contained in the original subject-matter. Here you are to have the then value of the tramway, exclusive of any allowance for past or future profits. You are to have the value assessed in the ordinary way in which a hereditament would be assessed for rating; you are not to make any addition, or give any compensation, to the person selling it for compulsory purchase, for the profits that he has earned in the past, or those he is likely to earn in the future. He is not going to be allowed to earn those in the future, and he knew when he came into existence that he would lose the opportunity of earning them after twenty-one years. He is now called upon to give up the value, measured in the ordinary way, of the hereditament of which he is the owner. It seems to me, upon these grounds, that the arbitrator was wrong in adopting an interpretation which excluded all these considerations, and therefore I agree that the award must go back.

Award sent back accordingly.

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From this decision the London County Council appealed.

Finlay, Q.C., and *G. M. Freeman*, for the appellants. The arbitrator was right in his construction of the 44th section of the London Street Tramways Act. The county council is to purchase the whole undertaking, but it is only to pay for the tramway, buildings, and plant. The word "tramway" does not include the goodwill, or the privilege of running tramcars, nor is any account to be taken of the profits of the company, past or future. The only way of giving effect to the words in the parenthesis "exclusive of any allowance, &c.," is to construe the word "tramway" strictly as meaning the rails only, and to take the value of them as measured by the expense which the company incurred in laying them down, or which the county council would have to bear in laying them down at the present time. The word "tramway" is used in its natural sense throughout the Act—for instance, in ss. 19 and 38. There is no injustice in these terms of purchase, for the company paid nothing themselves for the privilege of laying the rails and running the cars, and they knew from the beginning that their concession might only last for twenty-one years: *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board.* (1)

Sir R. E. Webster, Q.C., Cripps, Q.C., and *H. Sutton*, for the London Street Tramways Company. The concession of the right to run tramcars in the streets given by the Act of 1870 was not a temporary concession, but a concession in perpetuity. It could be sold by the company under s. 46, or it might be taken by the county council under s. 44, but in either case the company are entitled to sell the undertaking as a going concern. The tramway as used under the concession was a rateable hereditament, and its value ought to be calculated as it would be for rating purposes. In that case the measure of the assessment would be the rent which anyone would give for it, after making proper deductions. In such a calculation the profits are not included, either past or future, and the terms of the section would be complied with: *Pimlico Tramway Co.* v. *Greenwich Union* (2); *Rex* v. *Trustees of Duke of Bridgwater* (3);

(1) [1893] A. C. 444. (2) Law Rep. 9 Q. B. 9.
(3) 9 B. & C. 68.

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Rex v. *Tomlinson* (1); *Rex* v. *Lower Mitton* (2); *Rex* v. *Mast* (3); *Tyne Coal Co.* v. *Overseers of Wallsend* (4); *Elston* v. *Rose* (5); *Dobbs* v. *Grand Junction Waterworks Co.* (6); 6 & 7 Wm. 4, c. 96, s. 1; 25 & 26 Vict. c. 103, s. 15; 32 & 33 Vict. c. 67, s. 4; 33 & 34 Vict. c. 78, ss. 19, 43. The construction contended for by the appellants would work great injustice to the company, who would get merely the value of the rails and plant in return for the investment of their capital; and on the other hand, the county council, if they did not wish to carry on the work themselves, might immediately sell the undertaking with the privileges connected with it to a stranger at a large profit. If the legislature had intended that such a restricted meaning should be given to the proviso, they would have used the word "cost" or "price" instead of value.

Finlay, Q.C., in reply.

Cur. adv. vult.

LINDLEY, L.J. This is an appeal from an order of the Divisional Court remitting back to an arbitrator an award on the value of a tramway and other property belonging to the London Street Tramways Company, but taken by the London County Council under the powers of a special Act of Parliament (33 & 34 Vict. c. clxxi.). The question raised by the appeal is whether the arbitrator was right in point of law in valuing the tramway at what it would cost the London County Council to make it, or whether he ought to have ascertained what the tramway company could have let it for to a person who could use it, and then to have capitalized its annual value so ascertained. The question thus raised turns on the true construction of s. 44 of the Act above-mentioned. The section provides as follows:—[The Lord Justice read the section, and continued:—] The meaning of this section is, in my opinion, plain up to a certain point. The substance of it is as follows: (1.) The London County Council is entitled (in the events specified in the section) to require the tramway company to sell to them their undertaking. (2.) The

(1) 9 B. & C. 163.
(2) 9 B. & C. 810.
(3) 6 T. R. 154.
(4) 46 L. J. (M.C.) 185.
(5) Law Rep. 4 Q. B. 4.
(6) 9 App. Cas. 49.

sum to be paid is the value, at the date of the notice referred to in the section, of the tramway and other property mentioned in the section. (3.) But no allowance is to be made for past or future profits of the undertaking, nor for compulsory sale, nor for any other consideration. (4.) When the sale has been made, the London County Council will have the same right to work the undertaking as the tramway company had before. The short effect of this is that the value of the tramway and other property at the date of the notice is to be ascertained as between a buyer and a seller; but no allowance is to be made for goodwill, compulsory sale, severance, injury to other property of the vendors not sold, nor for anything whatever beyond the value of the tramway and other property which is to be paid for. So far the matter is plain. But the real difficulty now arises. How is the tramway to be valued? The first thing to ascertain is the meaning of "the tramway." It is not the undertaking; it does not include the statutory power of lengthening an existing way, nor of making other lines of rails authorized to be made, but not made at the date of the notice, nor does "tramway" include the business of the tramway company. "Tramway" means, in my opinion, the line of rails which the company were empowered to make and maintain, and which the company had laid down at the date of the notice. The next thing to ascertain is, What is the value of the tramway in this sense? My answer is, What any one would give for it. But how is this to be ascertained? The vendors have only a right of user (s. 20); they have no land to sell; they have only an easement so far as the land is concerned; but they have an exclusive right to use the tramway (s. 29) and to grant licences to other persons to use it (s. 37). These rights will be enjoyed by the purchasers, and these rights must be borne in mind in ascertaining the value of the tramway. These rights exclude any valuation of the tramway as so much old iron to be broken up and removed. The tramway must be valued as an existing tramway, used as such by the vendors before the sale, and to be used as such by the purchasers after the sale. But are the purchasers to pay for the right of user? The right of user clearly adds to the value of the tramway; if it were not for the right of user the value of the

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tramway would be only the value of so much old iron. The right of user cannot, then, be ignored and be wholly disregarded. Apart from the direction that no allowance is to be made in respect of past or future profits of the undertaking, there would be no difficulty. The tramway would be valued as something yielding profit; the rails and the goodwill—i.e., the profit to be expected from their use—would both be valued, and the value thus ascertained would be the value of the tramway. But then no allowance is to be made for profit, and the problem is thus reduced to the question, What is the value of the tramway to a purchaser entitled to use it, but who is not to be charged anything in the shape of an allowance of past or future profit of the undertaking? The arbitrator has answered this question by saying that the value is what it would cost the purchaser to lay down the tramway. After much consideration I have come to the conclusion that he is right. Excluding the value of old iron on the one side and all allowance in respect of past or future profit of the undertaking on the other, there appears to me nothing left except to say that the present value is either what the tramway cost to make, less some deduction for depreciation from wear and tear, or what it would cost the purchasers to make if they had to make it themselves. Cost price is well known to be no real criterion of the value of an outlay on land. What the result of the outlay will fetch if sold is often much more and often much less than the outlay which has produced it, and the arbitrator was quite justified in not adopting this mode of valuation. There remains only the other, which he has adopted. He has adopted it because he finds it impossible to value the tramway by ascertaining what it would let for without taking into account and indirectly making an allowance for past or future profit of the undertaking, which the statute directs him to exclude. It was urged with much force by the counsel for the tramways company that to take profit into consideration in order to ascertain the value of property is one thing, to make an allowance for profit in addition to such value is a totally different thing, and that, whilst the statute prohibits any such allowance or addition, it is quite silent as to the mode of valuing the property which is to be valued and paid for. It was urged that

to construe the words which state what allowances are to be excluded, as directing that no regard is to be had to the fact that the tramways company are selling property of great value for use at the time of sale, is to put a forced and an unnatural construction on those words, and to lose sight of what is the key to the whole section—viz., that the county council are to buy the undertaking and to pay for the value of the corporeal property which they take over but are to pay nothing more. This argument very much impressed me. But, having carefully considered it, I have come to the conclusion that to give effect to it will be indirectly to make the county council pay for the use of the tramway, and to make them pay something for past or future profit, which the Act, in my opinion, did not contemplate. The arbitrator says distinctly that this is the reason why, after admitting evidence of what rent could be obtained from a tenant, he ultimately felt unable to act upon such evidence in making his award. The evidence thus admitted, but not acted on, was based on the profit which could be made by a purchaser of the tramway. See, for example, pp. 14 and 15 of the print. But this mode of valuation is, in my opinion, only admissible in cases where an allowance for such profit can properly be made by the vendor, and not in a case where such an allowance is expressly excluded. I may add, however, that I do not attach importance to the argument of the counsel for the county council, based on the language of the last part of s. 44, which vests the rights of the tramways company in the county council as if they had constructed the tramways and had been named in the Act; for, although at first sight these words support the contention of the county council, yet very similar words are found in s. 46, which applies to other purchasers, who, I apprehend, would have to pay for the undertaking valued in the usual way, and not for the value of the tramway without any allowance in respect of past or future profit of the undertaking.

The crucial point is whether the county council, buying the undertaking under s. 44, are to pay for the right to use the tramway when they have acquired it. In my opinion, they are not to pay for this right, although, as I have already pointed out, its existence cannot be wholly ignored. There is no

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injustice in this conclusion, because the tramways company paid nothing for the acquisition of their right to use the public streets when they laid down their tramways. The conclusion at which I have thus arrived is, I think, strengthened by ss. 42 and 43, which relate to what is to be done if the tramways company cease to use their tramways or become insolvent. In that case the tramways may be removed at the expense of the company without any compensation, unless their powers are purchased by the county council under s. 44. In the cases provided for by ss. 42 and 43 any valuation based on profit cannot, I think, have been contemplated by the legislature. The case appears to me one of great difficulty—far more difficult than *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board* (1), which was so different from the one before us that it is really of little or no use as a guide for the interpretation of the statute with which we have to deal on the present occasion. The result arrived at is, however, the same in both cases—viz., that the purchasers are not to pay for the profit which they may make by the use of what they buy, and are not to compensate the vendors for their loss of profit. This, in my judgment, is the key to the problem which we have to solve. I agree, therefore, with the conclusion arrived at in Scotland in the case of the Edinburgh tramways (2), and am unable to adopt the view taken by the Divisional Court, and by the Lord President who differed from his colleagues in the Scotch case.

KAY, L.J. The question in this case is, What is the true construction of the statute (33 & 34 Vict. c. clxxi.) by which the London Street Tramways Company was incorporated? This Act authorized them under certain restrictions to lay down tramlines in certain streets in London, and to have the exclusive right of running tramcars with flanged wheels upon them. This privilege was granted without exacting any payment to any one; but the condition of the grant is expressed in s. 44, which has been read by Lindley, L.J. "Their undertaking" in that section means the goodwill, expectation of future profits, the

(1) [1893] A. C. 444.
(2) *Edinburgh Street Tramways Co.* v. *Magistrates and Council of Edinburgh* (31 Scotch Law Reporter, 598).

tramway and all lands, buildings, works, materials, and plant of the company, suitable to and used by them for the purposes of their undertaking. This would be primâ facie the meaning of the word undertaking; but the context, which requires payment of the value of the tramway, lands, buildings, works, materials, and plant, makes it clear that the word undertaking, describing that which is sold, includes all these, and is used in its most comprehensive sense. Then, secondly, it is clear that the price to be paid is not the value of the undertaking, but of something less than the undertaking. The price to be paid is the value of the tramway and all lands, buildings, works, materials, and plant, and in computing such value no allowance is to be made for past or future profits of the undertaking, nor any compensation for compulsory sale, or other consideration whatever. The words "exclusive of" must mean that the "value" which is to be the measure of the price is not to include any such allowance. What is the value of the tramway excluding any such allowance? It must be the then value of the construction—the physical thing—putting entirely out of sight its profit-earning capacity. I think the appellants' suggestion, that it means the sum for which at the time of the sale a contractor would make and hand over such a tramway in its then condition, probably is as near a correct description of the meaning as can be given. The same construction applies to the then value of the lands, buildings, works, materials, and plant. In estimating their value, no allowance is to be included for past or future profits of the undertaking; the value of each is to be taken disregarding the profit that may be made by the use of them in carrying on the undertaking. In short, the meaning of s. 44 is, that the tramways company, having obtained the power of making and using the tramways gratuitously, are subjected to this condition—that at the end of twenty-one years they may be required to hand over their whole undertaking to the urban authority on being paid the then value of the structure and plant without any allowance for its capacity of making profits. This is not an unreasonable condition. The undertaking may succeed or fail. In either case the price to be paid is the same. The urban authority represents the grantors of the right to make

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the tramway and to use it, and s. 44 provides in effect for a redemption of that grant after the end of twenty-one years, on the terms of making full compensation for the outlay of the tramways company, without any allowance for goodwill, past or future profits.

This is the view taken by Sir F. Bramwell, the arbitrator, to whom the computation of the price was referred. It was taken to be the meaning of a like provision by another arbitrator, Mr. Tennant, in a similar case, and his view was adopted in a very lucid and able judgment by the Lord Ordinary (Lord Low) in an action of declarator in Scotland, and that judgment has now been affirmed on March 20 last by the Divisional Court in Scotland, consisting of Lord Adam, Lord M'Laren, Lord Kinnear, and the Lord President, the last-named learned Lord dissenting from the rest of the Court. (1)

The tramways company have adduced a body of evidence by experts familiar with the business of tramways. These gentlemen have not taken the books of the tramways company, and found from them what profits the company were actually making. I can only suppose it was thought that would make the fallacy of their calculation too apparent. But from an examination of the locality and of the number of persons using the tramcars, they have formed an estimate of the gross receipts from this amount; they have deducted the outgoings; and the result is the net profits made by the tramways company. One half this net profit, it is said, is the rent which would be given by a person or company hiring the whole undertaking as a going concern, with power to carry it on as the tramways company have been doing. They then capitalize this sum by multiplying it by twenty, and the result is the value which, in the opinion of these witnesses, ought to be paid.

It is argued that the value so arrived at does not contain any allowance for profits. The fallacy seems to me apparent. As the learned judge in the Scotch case said, if the tramways company had let the undertaking at that rent, the rent would be all the profit they would make. Indeed, they might have some out-

(1) *Edinburgh Street Tramways Co.* v. *Magistrates and Council of Edinburgh* (31 Scotch Law Reporter, 598).

goings to deduct, so that their actual profit might be less. To give twenty years of that profit, and then to say that no allowance for profit is made, is a contradiction so startling that I am surprised it should be argued. On this method of computation the price to be paid varies directly with the profit. If the profit were 19,000*l.* a year, the rent would be 9500*l.*, and twenty years' purchase would be 190,000*l.* If the profit were 5000*l.* a year, then the rent would be 2500*l.*, and the price 50,000*l.* Indeed, if the tramway, buildings, and plant are all to be valued on this principle, I should have thought that the company would get a good price for the goodwill of their concern. Twenty years' purchase of half the profits equals ten years' purchase of the whole, and not many trading concerns would sell for more than that. But we are told that a company like this, having a monopoly by statute, would sell for more. Even if that is so, some allowance for profit is included in the value so arrived at, and this is what the Act forbids.

Then it is argued that, notwithstanding the exclusion clause, the Act does not forbid some allowance for profits. It was sought to lessen the meaning of the word undertaking, and to enlarge that of tramway. The interpretation clause was referred to, according to which "tramways" is to mean the same as "undertaking." In the first place, the word in s. 44 is not tramways but tramway; and secondly, if it were tramways, the context shews that it does not mean "undertaking" in s. 44. In many sections of the statute the plural word "tramways" is used where it would be impossible to read it as undertaking. But if it had that meaning, it really would not assist the argument of the company. The section would then run thus: They are to sell the undertaking at the then value of the undertaking, without any allowance for past or future profits. The words of exclusion would have the same force in either case. It is argued that the use of the word "exclusive" shews that value of the tramway would include an allowance for profits but for the excluding clause. It follows that, the excluding clause being there, it does not include it. But it is not a sound argument. The exclusive clause is put in to make the meaning more clear, and probably on account of the argument I am next about to notice. It

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excludes expressly compensation for compulsory sale, which is not included in the value.

Great reliance was placed on the rating cases. It is said that even before the 6 & 7 Wm. 4, c. 96, s. 1, which expressly makes the rent which a tenant would give, subject to certain deductions, the criterion of the annual value for rating purposes, this had been the law. But there are no exclusive words in the rating statutes such as we find here. Moreover, the principle of those cases is to apportion the rate fairly among all occupiers; and if one is in occupation of premises whose value as an hereditament is greatly increased by its profit-earning capabilities, it would be unfair to other ratepayers not to take that into account. The rateable value of a house in Bond Street must be greater than that of a precisely similar house in Islington, both being used as shops. This supposed analogy seems to me to be the basis of the whole argument; but in my opinion there is no analogy at all—first, by reason of the different nature of the two cases, but chiefly because of the excluding clause, which was probably put into this statute for the very purpose of preventing any argument being raised upon this supposed analogy.

Next it was said, the exclusion is only of past and future, not of present, profits. I confess this argument surprised me. In ascertaining the value of a tramway no allowance is to be made for past or future profits of the undertaking. But it is argued there may be an allowance for present profits. What are present profits? They are the profits made in the past year, month, week, or day. It is impossible to estimate them except by calculating past profits; no allowance for past or future profits includes of necessity no allowance for present profits. But if an allowance were made for present profits, which must mean the profits which the undertaking has been making up to the time of sale, the whole value of the goodwill must be included. Goodwill is only the capacity of making future profits, and this can only be arrived at by knowing what it has made in the past. Counsel were pressed with the difficulty of giving any other intelligible meaning to past profits, and they suggested that it meant an expenditure upon the line out of past profits. But this would be

compensated in estimating the then value of the structure, and therefore the words cannot be so satisfied. With respect to future profits they suggested that means a probable increase of profits in the future. But those are not the words.

Counsel for the company admitted that the value of the goodwill of the undertaking was not to be paid. But why not? If their argument is sound, that value, or at any rate a large part of it, would be payable. It is only not payable because the words of s. 44 exclude it, and the exclusive words are those which refer to past or future profits. But the words are that there shall not be "any allowance" on this account. So that the only possible alternatives are to include the whole value of the goodwill, or to exclude it altogether.

Collins, J., was much pressed with the consideration that the thing to be sold was the undertaking, and that primâ facie the price should be the value of the undertaking. I entirely agree; but the statute says that this is not the price, but something less; and, as I have pointed out, counsel agree that the value of the goodwill must be excluded from the price.

Having given to the judgments of the learned judges in the Court below, and the ingenious arguments addressed to us, all the consideration I can, my clear opinion is that no allowance for profits of the undertaking is to be included in the price to be paid, but that such price is to consist of the structural value of the tramway, lands, buildings, works, and suitable plant, and of that only; and that the company's mode of computing such value is entirely wrong, because it includes a large allowance for the profit of the undertaking, which the statute expressly and carefully excludes.

A. L. SMITH, L.J. The question raised is this: At what price are the appellants, the London County Council, empowered by statute to buy what they are compelling the respondent company to sell to them?

Although the case arises under the London Street Tramways Act, 1870 (33 & 34 Vict. c. clxxi.), the point under consideration is the same as it would be if it arose under the General Tramways Act passed in the same year, and this decision is therefore of

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moment to all the tramway companies in England, and there can be no doubt about the magnitude of the interests involved.

The great dispute is this: Can the London County Council, when they are minded to step in and buy up the respondent company, do so upon payment merely of the then value of the structure of the tramway in situ, ascertained by taking what it would cost the county council to make it? Or must the county council pay the then value of what the company have to sell—i.e., the then value of their tramway in use, together with the rights, powers, and authorities of maintaining the same in the streets, of running cars thereon, and of earning tolls thereby, ascertained in the usual and accustomed way of finding out what the present value is by estimating the rental which might be obtained, and then capitalizing that rental? I need not here deal with the other matters the company have to sell—viz., the lands, buildings, works, and plant they may have, suitable to and used by them for the purposes of their undertaking.

The case has been well argued on each side, and it has given rise to a diversity of judicial opinion: four judges in Scotland in the recent case of the *Edinburgh Street Tramways Co.* v. *Magistrates and Council of Edinburgh* (1) having affirmed the construction placed upon the section by the county council; the Lord President, and my brothers Mathew and Collins, JJ., having upheld the contention of the company.

Sect. 44 of the London Street Tramways Act, 1870, upon the true interpretation of which the decision of this case depends, after setting forth the three occasions in which the London County Council are empowered to become purchasers of a tramway, otherwise than by agreement, proceeds: [The Lord Justice read the material parts of the section.] Considering the arguments which have been addressed to us, it becomes necessary to understand, in the first place, what under the Act is to be sold and bought; next, whether what is to be paid is to be for the whole, or only for part of what is sold and bought; and, lastly, how the price which is to be paid is to be arrived at. I cannot doubt that what is to be sold and bought is not merely the tramway in situ as a structure, but the undertaking of the company as a

(1) 31 Scotch Law Reporter, 598.

going, toll-earning concern—i.e., the tramway as then in use, with the rights, powers, and authorities of the company to maintain it in the public streets, run cars thereon with flange wheels, to the exclusion of all others; to take the prescribed tolls for so doing, and to exercise the other powers contained in the Act. Of this I have no doubt; the words of the section are clear: "And thereupon the company shall sell," not their rails and sleepers, but "their undertaking," and "when such sale has been made all the rights, powers, and authorities of the company in respect to the undertaking are to vest in the county council." By the interpretation section (s. 3), the expression "the undertaking" shall mean "the tramways and works and undertaking by this Act authorized, or any part thereof."

It seems to me that the undertaking comprises three distinct matters. First, the tramways in situ in the streets. By s. 5 the company are authorized to enter upon, take, and use (not purchase) lands delineated in certain plans, and to lay down and maintain street tramways thereon with all proper rails, plates, works, and conveniences connected therewith. This constitutes the tramways. Secondly, the powers granted to the company of running cars with flange wheels thereon, to the exclusion of all others, and of taking the prescribed tolls and the other powers in the Act mentioned. And, thirdly, in addition to what is included in No. 1, all lands, buildings, works, materials, and plant of the company which they may have purchased by agreement if suitable to and used by them for the purposes of their undertaking. The Lands Clauses Consolidation Acts, 1845, 1860, and 1869, which are incorporated in the London Street Tramways Act, 1870, except with respect to the purchase and taking of lands otherwise than by agreement, and with respect to the entry upon lands by the promoters of the undertaking, give the company power to purchase lands. It is these three things which the company have to sell under the words "their undertaking," and that this is what is to be sold by the company to the county council I do not doubt.

I now come to consider the next question, which is this: Is the whole or only part of what is sold and bought, and, if so, what part, to be paid for by the county council, or, to state the

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point in detail, is only the tramway in situ to be paid for together with the lands, buildings, works, materials, and plant, as mentioned in the section, or are the rights, powers, and authorities granted by the Act to the company, and which the county council undoubtedly obtain by their purchase, also to be paid for by them? It cannot, I think, be denied that ordinarily a purchaser pays for the whole of what he purchases though a statute may enact that it shall be otherwise. I should say that unless the statute be explicit upon the point the strong presumption is that the whole of what is sold is to be paid for. I should say that the phrase, "paying the then value of the tramway," primâ facie meant the then value of the tramway as a structure in situ, and more especially when it is coupled with the other named matters—lands, buildings, works, materials, and plant, which are also in like manner to be paid for. The words are not, the company shall sell their undertaking to the county council upon the terms of paying its then value, but upon the terms of paying the then value of the tramway, exclusive of any allowance for past or future profits of the undertaking. It is said, however, that the words "the tramway" as here used denote more, and that they are equivalent to the words "the undertaking." Mathew, J., thought that the interpretation section brought this about; but I would point out that there is no definition of the words "the tramway," but only of the words "the tramways." If the words "the tramway" in the singular are to mean the undertaking, why add thereto the words, "and all lands, buildings, works, materials, and plant," if suitable and used by the company, which, as before shewn, form one of the subject-matters of the undertaking, and would be included in the word "undertaking" alone?

It will be seen that in addition to s. 46, which gives power to the company in certain events to sell, if they so desire, their undertaking to willing purchasers, in which case the contracting parties can agree inter se as to what is to be sold and what paid for, there are three sections which enable the London County Council to become purchasers otherwise than by agreement, viz., ss. 42, 43, and that now in hand, s. 44. By s. 42, when a tramways company have discontinued working for three months, the

Board of Trade may declare that the powers of the company shall be at an end, and thereupon the powers shall cease, unless the same are purchased by the county council in the manner provided by s. 44 of the Act, viz., upon the terms of paying the then value of the tramway (I omit what is said about the lands, buildings, &c.). This cannot mean upon paying the then value of the powers. It does not say so; and why should a company be paid for that which they have been the cause of bringing to an end? By s. 43, when a tramway company have become insolvent, the Board of Trade may declare that the powers of the company shall be at an end after the expiration of six months from its order, and that they shall accordingly cease unless the same are purchased by the county council in the manner provided by s. 44, i.e., upon paying the then value of the tramway. In my judgment, what is to be paid for under each of these sections is, that part of the undertaking represented by the structure of the tramway in situ, and not the powers which the county council then obtain. They pass to the county council upon discontinuance of working or upon insolvency of the company, upon payment by the county council of the then value of the tramway. Lastly, by s. 44, after the expiration of twenty-one years from the passing of the Act, the county council can compel the company to sell their undertaking to them if the county council give the prescribed notice requiring such sale; and here, as before, the company are to sell upon the terms of being paid, not the then value of the undertaking, but the then value of the tramway, together with the then value of all lands, buildings, works, materials, and plant then belonging to the company, which are suitable to and used by the company for the purposes of their undertaking. These last are also to be purchased by the county council when they purchase under s. 42 or 43. It seems to me that the words "the tramway" in each of these three sections mean the same thing, that is, the part of the undertaking which consists of tramways, points, and sidings in situ, and not the whole undertaking, as contended for by the company. It is here that I differ from my brothers Mathew and Collins, JJ., who read the words "the tramway" as comprehending the whole "undertaking" to be sold. My brother Collins points out that, if the

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word tramway is read as I read it, there was no necessity for the parenthesis, for the mere tramway, as it exists in situ, is incapable of earning profits, and that, therefore, profits had no place in the discussion. I feel the force of the observation; but in my judgment the parenthesis was necessary to prevent the controversy which would otherwise arise as to whether, inasmuch as the whole undertaking was to be sold, and only the tramway was to be paid for, a claim for any allowance for profits, compulsory purchase, or any other consideration whatever, was to be made by the company. In the endeavour to prevent this the parenthesis was inserted.

I cannot, for the reasons I have given above, read the word tramway in s. 44 as embracing the whole undertaking. The lands, buildings, works, materials, and plant which the company may have purchased, and which were suitable to and used by the company for the purposes of their undertaking, though undoubtedly to be purchased by the county council, are not part of "the tramway," but in addition thereto. In my opinion the Act, when examined, clearly defines what is to be sold and what paid for, which is that the undertaking as a whole is to be sold, and only the tramway in situ is to be paid for, together with the lands, buildings, works, materials, and plant above mentioned, and that the primâ facie presumption which otherwise would arise is rebutted by the express language of the statute.

I now come to the question how the price to be paid for the structure of the tramway in situ is to be estimated. It was argued on behalf of the county council that, as the company had paid nothing in the first instance for their concession to make the tramway, it was but reasonable that they should sell what had been so obtained, after twenty-one years' enjoyment of it, to the county council (the twenty-one years being the limit of time for which they had obtained an indefeasible right of user, subject to discontinuance of working and insolvency) at the price which the tramway had cost the company, as also the other things mentioned in the section, less depreciation by wear and tear in the meantime, if any. It may, however, on the side of the company, be said that they paid a large sum of money in

obtaining their Act, and that it was unreasonable to allow a purchaser to come in and purchase at a price less than the value of the thing purchased, and appropriate the excess value to his own use. It seems to me fruitless with these conflicting considerations to speculate upon what may or may not have prompted the legislature to pass the Act, for after all it must come to this, What is the true reading of the section?

There can be no doubt that in any ordinary case where an undertaking such as the present is to be sold and paid for its present—that is, its then value—is in practice arrived at by capitalizing its rental value. I should say that this is the true way of arriving at its present value. To ascertain rental value, the first thing the hypothetical tenant looks to is to ascertain what can be made out of the thing to be rented—what profits have been made in the past out of it—so as to estimate what profits are likely to be made in the future, in other words, what is its net annual value. He does the same whether the subject-matter be a public-house which has in addition a trade profit attached to it, or whether it be a grass field which has no such profit. It is upon these figures that he bases the rental he will give; and this rental, when capitalized, is the present value of the thing bought.

Had there been no words of exclusion as in the parenthesis in this case, and had it been the whole of the undertaking which was not only to be sold but paid for, I should have said that capitalizing the rental value of the undertaking was the correct mode of ascertaining its then value. But here, though the undertaking is to be sold only, the "then value of the tramway" is to be paid for; and it appears to me that the legislature has expressly enacted for the reason above stated that the hypothetical tenant, if he is resorted to as the means of ascertaining the rental value, shall not include in his estimate any allowance for either past or future profits of the undertaking. It was said, however, that he might include present profits, for they were not excluded. I cannot follow this reasoning. What are the so-called present profits but profits earned in the past? They are the profits earned prior to the day upon which the supposed calculation takes place, and are nothing

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more or less than past profits, and these are excluded by the section.

My brother Mathew, J., felt the difficulty arising from the exclusion of past profits from present value in the section, and he surmounted it by saying that the words excluding any allowance for past profits could not alter the whole meaning of the section; but with all submission, that begs the question as to what is the meaning of the section. Assume a case in which a tramway company had let its undertaking for 1000*l.* a year. In this case the 1000*l.* a year would be the profit of every sort which the company made. If the rental were capitalized to get present value, can it be said that no allowance for past profits had been included? Surely not.

We were strongly pressed by Sir Richard Webster to hold that the principle laid down in rating cases applied, and he said, and with truth, that surveyors were daily ascertaining the annual value of a hereditament irrespective of trade profits attaching thereto, as in case of breweries, paper-mills, railways, and such like; for it was upon the annual value of the hereditament, and not upon the trade profit, that the rate had to be based. This is so; but in the annual value of a hereditament for rating purposes, apart from trade profit, the tenant's profit is included; and it is here that the parenthesis in the section comes in, and expressly differentiates the present case from rating cases. There are no such words of exclusion in rating cases. The words, as I read them in the statute, are peremptory, any allowance for past profits made out of the undertaking of whatever kind, as also for future profits—that means, the anticipation of future profits shall be excluded in arriving at the present value of the tramway. They are not that only trade profits are to be excluded, but all profits, past or future, of the undertaking. What are tenant's profits of a tramway in situ, incapable of being worked by a tenant? There are none; but the parenthesis had to be inserted because the undertaking was to be sold as above pointed out. If this be so, the then value of the tramway must be what it cost to construct, less depreciation for wear and tear, for there is no other then value excepting that taken by Sir Frederick Bramwell which I understand to be equivalent thereto.

I must add that in rating cases the Parochial Assessments Act, 1836 (6 & 7 Wm. 4, c. 96), has expressly enacted, not that past and future profits are to be excluded, but that the estimate of the net annual value of the hereditament rated is to be that of the rent at which the same might reasonably be expected to let from year to year free of the deductions therein named. I find no such enactment in the London Street Tramways Act of 1870, whereby to ascertain the then value of the tramway. To my mind, the real question is this: Are the words of exclusion in the section so strong when applied to the thing which is to be paid for, viz., a tramway in situ, as to exclude the ordinary way of ascertaining present value? For the reasons above, I have arrived at the conclusion that they are, and that Sir F. Bramwell was right when he held that rental value involved an allowance for past or future profits within the meaning of the section, and that this mode of arriving at the present value of the tramway in situ was not permissible.

It was not contended that if the county council were right in their construction of the statute the way in which the tramway in situ has been valued was erroneous, and no point has been made as to the way in which the lands, buildings, works, materials, and plant have been valued, nor do I know how the value has been ascertained.

As to the case of *Stockton and Middlesborough Water Board* v. *Kirkleatham Local Board* (1), to the judgment of which in this Court I was a party, I have nothing to say excepting that it was a case upon a different Act of Parliament and upon a different state of facts, and, in my opinion, has little if any bearing upon the construction to be placed upon the London Street Tramways Act, 1870. If, however, that case is to be used in the view I take of s. 44, it certainly does not militate against the judgment I have now arrived at.

I think, for the reasons above, that this appeal should be allowed.

Appeal allowed.

Solicitors: *Ashurst, Morris, Crisp & Co.*; *W. A. Blaxland.*

(1) [1893] A. C. 444.

M. W.

C. A.

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April 11; *May* 1.

[IN THE COURT OF APPEAL.]

ANDERSON *v.* DEAN.

Liverpool Court of Passage—Inferior Court—Appeal—Liverpool Court of Passage Act, 1893 (56 & 57 *Vict. c.* 37), *s.* 10—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1.

By the 10th section of the Liverpool Court of Passage Act, 1893, "An appeal shall be allowed upon the trial of any issue in the Court of Passage in every case where an appeal would be allowed on a trial at nisi prius, and subject to the same rules, regulations, and provisions":—

Held, that under the above-mentioned section an appeal from the judgment in an action in the Court of Passage lies to the Court of Appeal.

APPEAL of plaintiff from the judgment of the learned judge of the Liverpool Court of Passage in an action tried before him without a jury.

April 11. *Montague Lush*, for the defendant, took a preliminary objection to the appeal. The appeal from the Court of Passage is, as in the case of other inferior courts, to the Divisional Court in the first instance, not to the Court of Appeal: see Judicature Act, 1873, s. 45. The plaintiff will rely on the 10th section of the Liverpool Court of Passage Act, 1893, as giving an appeal direct to the Court of Appeal. But it is submitted that that section does not apply to actions, but is intended to provide for appeals in the case of interpleader or garnishee issues in the Court of Passage. Assuming that the section applies to actions, it does not expressly say to what Court the appeal is to be; and, if the legislature had intended to change the Court, express words would have been used to that effect. The terms of the section would be fully satisfied by construing it to mean that the appeal shall be to the same Court as before, but shall be subject to the same rules and regulations as to procedure as an appeal in a High Court action. If the contention for the plaintiff is correct, there will be an appeal up to the House of Lords in an action in the Passage Court without any leave, though the amount at stake may be very trifling. By the Liverpool Court of

Passage Procedure Act, 1853 (16 & 17 Vict. c. xxi.), s. 45, by the leave of the judge on the trial of any issue, an application to set aside the verdict or judgment might be made to one of the superior Courts at Westminster. The object of the section now in question appears to be to allow an appeal without leave of the judge, subject to the same conditions as in an appeal from the High Court, but not to alter the Court to which such appeal is to lie.

Shepherd Little, for the plaintiff. The term "issue" obviously is intended to have the same meaning as in the Liverpool Court of Passage Procedure Act, 1853 (16 & 17 Vict. c. xxi.), s. 45; and therefore it cannot be confined to such issues as interpleader issues, but must be construed in the widest sense. The defendant's second contention gives no effect to the word "provisions" in the section. In the case of a trial at nisi prius the Supreme Court of Judicature Act, 1890 (Finlay's Act), s. 1, provides that the application to set aside the verdict or judgment in a High Court action must be direct to the Court of Appeal. The 10th section of the Liverpool Court of Passage Act, 1893, distinctly provides that the appeal from the Court of Passage shall be subject to the same provisions as an appeal on a trial at nisi prius.

Montague Lush, in reply.

Cur. adv. vult.

May 1. DAVEY, L.J., read the judgment of the Court (Lord Esher, M.R., A. L. Smith, L.J., and Davey, L.J.). This is an appeal from a judgment of the learned judge of the Court of Passage on the trial of an action. A preliminary objection has been taken on behalf of the respondent that the appeal is not to this Court, but to a Divisional Court of the Queen's Bench Division.

The question depends on the true construction of s. 10 of the Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37). But in order to understand the question one must look at the position of the Court of Passage as regards appeals at the time when the Act was passed.

The Court of Passage is an inferior court, though an ancient Court of Record. By a section of the Court of Passage Act, 1853, an appeal is given with the leave of the judge of the

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Court "on the trial of any issue" to one of the superior Courts at Westminster; and by s. 45 of the Judicature Act, 1873, that jurisdiction is transferred to the High Court. There was, therefore, at the time of the passing of the Act of 1893, existing a right of appeal "on the trial of any issue" (whatever those words may mean) from the Court of Passage to the High Court, but subject to the leave of the judge of the Court of Passage. Sect. 7 of the Act of 1893 gives to the registrar of the Court of Passage all the powers which a registrar, district registrar, master, taxing officer, or associate of the High Court has or would have in the same matter if the same were proceeding in the High Court; and s. 8 enables the judge of the Court of Passage, with the concurrence of the Rule Committee, to adopt and apply to the Court of Passage all or any of the rules for the time being regulating the practice and procedure of the High Court. So far an intention may be discerned to assimilate the practice of the Court of Passage to that of the High Court. Then comes s. 10, which is in these words: "An appeal shall be allowed upon the trial of any issue in the Court of Passage in every case where an appeal would be allowed on a trial at nisi prius, and subject to the same rules, regulations, and provisions." The question is whether this section gives a new right of appeal to this Court, or merely regulates the old right of appeal, and defines the conditions under which it is exerciseable.

It is argued that "a trial at nisi prius" can take place in the High Court only, and that under the provisions of 53 & 54 Vict. c. 44, known as Mr. Finlay's Act, a motion for a new trial or to set aside a verdict, finding, or judgment (which is the only way of appealing on a trial at nisi prius) comes to this Court. It is further pointed out that the word "provisions" is large enough to include the provisions of the Judicature Acts (including Mr. Finlay's Act), and that word will have no force or effect as distinguished from rules and regulations unless it be so construed.

On the other hand, it is contended that the effect of the section is merely to remove the necessity for obtaining the leave of the judge to an appeal "upon the trial of any issue" under the Act of 1853, and to assimilate the procedure on appeals to the

Divisional Court to that on appeals to this Court from the High Court in like cases.

We are not altogether satisfied that we ought without express words to construe the section as creating a new Court of Appeal from the Court of Passage; but, looking to the intention shewn in ss. 7 and 8 to assimilate the procedure of the Court of Passage to that of the High Court, and to the difficulty of giving full effect to the language in which s. 10 is expressed, without saying that an appeal is given to this Court, we think that this is the sound and right construction of this somewhat obscure section. We therefore think that the preliminary objection should be overruled.

The Court then heard the appeal and ordered a new trial.

Appeal allowed.

Solicitors for plaintiff: *Ridsdale & Son, for H. Davies, Liverpool.*

Solicitors for defendant: *Crowders & Vizard, for Clarke & Davis, Liverpool.*

E. L.

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April 17;
May 1.

[IN THE COURT OF APPEAL.]

NIND *v.* NINETEENTH CENTURY BUILDING SOCIETY.

Landlord and Tenant—Breach of Covenant to Repair—Forfeiture—Liability of Underlessee for Costs of Lessor's Solicitor and Surveyor—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2—*Conveyancing and Law of Property Act,* 1892 (55 *&* 56 *Vict. c.* 13), *s.* 2, *sub-s.* 1; *s.* 4.

An underlessee is not, as between himself and the original lessor, a "lessee" within the meaning of the Conveyancing and Law of Property Act, 1892, s. 2, sub-s. 1, and therefore such lessor cannot recover from him the costs and expenses mentioned in that sub-section:—

So *held*, reversing the decision of a Divisional Court.

By Lord Esher, M.R., and Davey, L.J.: A lessee who, by complying with a notice given under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, prevents a right of forfeiture from becoming enforceable, is not "relieved" from a forfeiture within the meaning of s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892.

APPEAL from judgment of a Divisional Court (Day and Lawrance, JJ.). (1)

The facts were as follows. In the early part of 1884 the plaintiff's predecessor in title by eleven several indentures of lease demised eleven houses to different tenants for long terms of years. Such leases contained covenants to repair, with the usual proviso for re-entry on breach of the covenant. The interests of the several lessees became vested in one Henry Hall, who at the end of 1884 mortgaged the same by way of underlease to the defendants. In 1892 the plaintiff discovered that the premises were out of repair. He accordingly employed a surveyor to inspect the premises comprised in the several leases, and to prepare a schedule of the works necessary to remedy the breaches of covenant. He also employed a solicitor to prepare notices under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, which notices were served by leaving them at the respective houses. The defendants, in order to avoid a forfeiture, complied with the requirements of the notices and put the premises into a condition of repair. The plaintiff then brought

(1) [1894] 1 Q. B. 472.

an action against the defendants in the City of London Court to recover the sum of 50*l.* for the costs and expenses incurred by him in the employment of the surveyor and solicitor above mentioned. There was no evidence of any written waiver by the plaintiff of his right of re-entry or forfeiture, nor of any request by the defendants that he should so waive his right. The judge gave judgment for the plaintiff. On appeal the Divisional Court affirmed his decision. (1)

(1) By the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 1: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

"(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action (if any), or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief, as the Court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit."

"(3.) For the purposes of this section a lease includes an original or derivative underlease . . . and a lessee includes an original or derivative underlessee."

By the Conveyancing and Law of Property Act, 1892, s. 1: "(1.) The Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this Act shall be read together."

Sect. 2: "(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which at the request of the lessee is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act."

Sect. 4: "Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's

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April 17. *Hopkinson, Q.C.*, and *D'Eyncourt*, for the defendants. The defendants do not come within the terms of s. 2, sub-s. 1, of the Act of 1892. The underlessees cannot properly be said to have been "relieved" from a forfeiture within the meaning of that section. The relief there referred to is relief by order of the Court under the Act of 1881 or the Act of 1892. Where under the provisions of s. 14, sub-s. 1, of the Act of 1881 the breach is remedied, there never is any forfeiture from which relief is required.

Secondly, s. 2, sub-s. 1, of the Act of 1892 only applies as between lessor and lessee. An underlessee is not a "lessee" as between himself and the original lessor within the meaning of the sub-section. By s. 14, sub-s. 3, of the Act of 1881, no doubt the term "lessee" is to include an "underlessee," but only for the purposes of s. 14. But, even if that interpretation were applicable to the Act of 1892, it would not assist the plaintiff; for it only means that an underlessee is to be within the provisions of the Act as between himself and his immediate underlessor.

The decisions in *Burt* v. *Gray* (1) and *Cresswell* v. *Davidson* (2) shew that an underlessee could not get relief under the Act of 1881 as against the original lessor seeking to enforce a forfeiture. Sect. 4 of the Act of 1892 provides that the Court in such a case may grant relief to an underlessee on terms—a provision which would have been unnecessary if an underlessee had been within the terms of the Act of 1881. There is no privity of contract or tenure between the lessor and the underlessee: the underlessee is not liable for damages for breaches of the covenants in the

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action (if any), or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease, or any less term, the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court, in the circumstances of each case, shall think fit; but, in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sublease."

(1) [1891] 2 Q. B. 98.

(2) 56 L. T. (N.S.) 811.

head lease, and it would be highly anomalous that he should be liable for these costs and expenses, which are occasioned by such breaches of covenant.

Jelf, Q.C., and *T. Terrell*, for the plaintiff. The term "relieved," as used in s. 2, sub-s. 1, of the Act of 1892, does not necessarily refer to something done by the Court. A tenant may, according to the fair meaning of the language used, be said to be relieved, when by the operation of s. 14, sub-s. 1, of the Act of 1881 a forfeiture becomes unenforceable against him. The result in such a case is, that the costs and expenses of the solicitor and surveyor, which were originally incurred by the lessor for his own benefit, enure to the benefit of the tenant, and it is reasonable that he should defray them. If the term "relieved" is confined to relief given by the Court, why should not the provision have been merely that these expenses should be recoverable in the proceedings in which relief is being sought? The provisions of s. 2, sub-s. 1, of the Act of 1892, were really unnecessary, unless they refer to cases under s. 14, sub-s. 1, of the Act of 1881, because, in cases where the Court grants relief, it can impose such terms as it thinks reasonable.

The defendants are lessees within the meaning of the Act of 1892. By s. 1 of that Act, it is to be read together with the Act of 1881, and the interpretation of "lessee" given by the earlier Act must therefore be applied to the later Act. The cases of *Burt* v. *Gray* (1) and *Cresswell* v. *Davidson* (2) turned upon the fact that the underlease only comprised a part of the premises included in the original lease.

[They also cited *Skinners' Company* v. *Knight*. (3)]

Cur. adv. vult.

May 1. LORD ESHER, M.R. I have read the judgment which Davey, L.J., is about to deliver, and agree with it. I do not wish to add anything to it.

A. L. SMITH, L.J., read the following judgment. In this action the plaintiff, who is a lessor, sues the defendants, who are

(1) [1891] 2 Q. B. 98. (2) 56 L. T. (N.S.) 811.
(3) [1891] 2 Q. B. 542.

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underlessees of premises of the plaintiff, to recover from them certain costs and expenses which the plaintiff has incurred in employing a solicitor and surveyor to prepare a notice specifying the particular breaches of covenant he complained of prior to commencing an action of ejectment founded upon such breaches.

It is obvious that, inasmuch as no privity of contract exists between the plaintiff and the defendants, this action is not maintainable, unless the plaintiff can bring himself within s. 2 of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13). This section enacts that "a lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which at the request of the lessee is waived by the lessor by writing under his hand, or from which the lessee is relieved under the provisions of the Conveyancing and Law of Property Act, 1881, or of this Act."

Now, it is apparent that, if this s. 2 stood alone, the plaintiff could not bring his case within it, for the section only deals with the case of lessor and lessee, and not the case of a lessor and lessee of a lessee, who is specially dealt with by s. 4 of the Act. Moreover, s. 2 deals with the recovery as a debt due of the costs and expenses, in addition to damages (if any) accrued to the lessor, which last presupposes a contractual relation between the lessor and lessee; for otherwise how are damages to be recovered? But it is said that this section does not stand alone; and the Queen's Bench Division, from which this appeal is brought, has held that a lessee in s. 2 of the Act of 1892 includes an underlessee.

It is true that the Act of 1892 is to be read together with, amongst others, the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), and by s. 14, sub-s. 3, of that Act, "for the purposes of this section," it is enacted that a lease includes an original or derivative underlease, that a lessee includes an original or derivative underlessee, and that a lessor includes an original or derivative underlessor.

It has been held that the true reading of s. 14, sub-ss. 1 and 2, when coupled with the interpretation in sub-s. 3 thereof, is that, when an original lessor proceeds by way of forfeiture against an original lessee, or a derivative lessor so proceeds against a derivative lessee, the relieving provisions of s. 14 come into play, but not otherwise, and consequently, if there be an underlessee, and an original lessor proceeds against an original lessee for a forfeiture and thus breaks the head lease, the underlessee cannot avail himself of the provisions of the section, for in such a proceeding that section does not apply to an underlessee. I have arrived at the conclusion that this is the true view to take of the section, and that what was said by Kay, L.J., in *Cresswell* v. *Davidson* (1), and by Mathew and Williams, JJ., in *Burt* v. *Gray* (2), is correct. It was in these circumstances, inasmuch as an underlessee was not able to avail himself of the relief to be obtained under s. 14 of the Act of 1881, when an original lessor was proceeding to eject the original lessee, and thus break the head lease, that s. 4 of the Act of 1892 came to be passed which, leaving the construction which had been placed upon s. 14, sub-s. 3, where it was, gave power to the Court to protect an underlessee in such cases, he not being within the beneficial provisions of s. 14.

In my judgment the word "lessee" in s. 2 of the Act of 1892 means lessee, and not underlessee; and this being so this action fails.

It was also said on behalf of the defendants that, even if the word "lessee" in s. 2 of the Act of 1892 included an underlessee, still the defendants in this case, though underlessees, were not "relieved under the provisions of the Act of 1881" so as to come within the section. It was said that "relieved under the provisions of the Act" meant only when relief had been obtained under sub-s. 2 of s. 14 of the Act of 1881, and that no "relief under the provisions of the Act of 1881" was obtainable under sub-s. 1 of s. 14. I am not prepared to hold this at the present moment, and, as it is not necessary on this appeal to decide this point, I abstain from expressing any opinion thereon. I think, therefore, that this appeal should be allowed.

(1) 56 L. T. (N.S.) 811. (2) [1891] 2 Q. B. 98.

C. A.
1894

NIND
v.
NINETEENTH CENTURY BUILDING SOCIETY.

DAVEY, L.J., read the following judgment. In this case two points have been decided in favour of the respondent by the Court below on the construction of s. 2, sub-s. 1, of the Conveyancing Act, 1892: (1.) that the word "lessee" includes a lessee of a lessee so as to give the lessor a right of action for debt against such an underlessee with whom the lessor has no privity of contract; (2.) that the words "from which the lessee is relieved" under the provisions of the Act of 1881 or this Act include the case of a lessee who, under sub-s. 1 of s. 14 of the Act of 1881, has remedied the breach of covenant and made compensation as required by a notice given in accordance with that sub-section. The appellants contest both these points; but if they succeed on one only, it is sufficient for the appeal.

It has been argued, and I think correctly, that we ought to give the word "lessee" the same construction in this sub-section which it bears in s. 14 of the Act of 1881, because this sub-section is but an enlargement and extension of s. 14. Now, it has been held by Kay, L.J., in *Cresswell* v. *Davidson* (1), and by a Divisional Court in *Burt* v. *Gray* (2), that the word "lessee" in s. 14 does not include the lessee of a lessee between whom and the lessor there is no privity of contract or tenure, and that the definition clause in sub-s. 3, which I need not read again, is to be construed only so as to make the provisions of the section applicable as between a derivative lessor and his lessee as well as between the first or head lessor and his lessee. On the whole, I agree with those decisions. I do not find any sufficient grounds for holding that by s. 14 it was intended to create new statutory rights between an original lessor and a derivative lessee claiming under his lessee, between whom no privity of contract exists; and I think that the words of sub-s. 3 can have full effect given to them without assuming such an intention on the part of the legislature. If I turn to the section before us, sub-s. 1 of s. 2 of the Act of 1892, I observe that the effect of the section is to give an action of debt to the lessor for the costs and expenses in question "in addition to damages." Now, damages can only be recovered in an action from a lessee in privity of contract with the lessor. I therefore do not find in this enactment any indica-

(1) 56 L. T. (N.S.) 811. (2) [1891] 2 Q. B. 98.

tion of intention to give a right of action against one who has not contracted with or is not liable to be sued by the lessor, but the intention seems to be to extend the amount recoverable through an existing right of action to these costs and expenses. If this be so, the appeal succeeds, and it is unnecessary for the purpose of this appeal to give an opinion on the second point; but, as it has been argued, and the Court below has expressed an opinion upon it, I will shortly state my views.

I am of opinion that the words "from which the lessee is relieved" primâ facie and according to their natural sense point to some action of the Court on the relations of the two parties, and the words "under the provisions," &c., point to such an act having been done pursuant to powers conferred by the Act. The words "relief" and "relieve" are the appropriate terms to describe the remedial action of the Court of Equity in cases where a penalty or forfeiture has been incurred, which the Court thinks it equitable that the complainant should not lie under or suffer. Sub-s. 1 of s. 14 imposes a fetter by way of condition precedent on a lessor wishing to enforce a right of re-entry or forfeiture. If the lessee within a reasonable time complies with the notice which the sub-section requires the lessor to give, there is not, in fact, any enforceable right of re-entry or forfeiture, and there is nothing from which the lessee requires to be relieved: and it seems to me an inaccurate use of language to speak of the lessee being relieved in such a case. I am aware that the words at the end of the sub-section—"or of this Act"—create some difficulty, but not, in my judgment, sufficient to induce the Court to depart from the primâ facie meaning of the words, or to give to the words a meaning which, in my opinion, they are not appropriate to express.

I am therefore of opinion that the appeal should be allowed, and judgment in the action given for the defendants.

Appeal allowed.

Solicitors for plaintiff: *Corsellis, Mossop, & Berney.*
Solicitors for defendants: *Griffinhoofe & Brewster.*

E. L.

1894
May 11.

IN RE DUNHILL. EX PARTE DUNHILL.

Bankruptcy—Act of Bankruptcy—Bankruptcy Notice—Date of Act of Bankruptcy—Statement in Petition—Amendment—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (*g*)—*Bankruptcy Rules,* 1886, 1890, *r.* 143 —*Appendix of Forms, Form* 10.

Where the act of bankruptcy relied on by a petitioning creditor is failure to comply with a bankruptcy notice, the petition must state the date of the act of bankruptcy.

A bankruptcy petition stated that the debtor had failed to comply with a bankruptcy notice served upon him on a day named:—

Held, that this statement was insufficient, and that the petition ought to state that the debtor had failed before a day, eight days later than the day on which the bankruptcy notice was stated to have been served, to comply with such notice:

Held, also, that the defect, in not duly stating the date of the act of bankruptcy, was not a ground for setting aside the receiving order, but ought to have been amended at the hearing of the petition, and could be amended by the Court on the hearing of an appeal from the receiving order.

APPEAL by the debtor from the decision of the registrar of the county court at Windsor making a receiving order.

The bankruptcy petition stated that the debtor had "failed to comply with the terms of a bankruptcy notice, to pay secure or compound for a judgment debt, obtained by me against him, which notice was served personally upon him on the 25th day of November, 1893." (1)

It was contended on behalf of the debtor that the facts, and the correspondence which had passed, shewed that the petition was not presented bonâ fide, but with the view of putting pressure on the debtor. The registrar overruled this contention, and made a receiving order.

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4 (1):—"A debtor commits an act of bankruptcy . . . . (*g*) If a creditor has obtained a final judgment against him, ... and, execution thereon not having been stayed, has served on him . . . . a bankruptcy notice under this Act, requiring him to pay the judgment debt in accordance with the terms of the judgment, or to secure or compound for it, ... and he does not, within seven days after service of the notice, ... either comply with the requirements of the notice" (or shew a cross demand, &c.).

Rule 143 and Form 10 (so far as material) are set out in the judgment.

Kisch, for the appellant. There are two objections to this receiving order. In the first place, the date of the act of bankruptcy relied on is not stated in the petition. By rule 143, a creditor's petition is to be in Form 10, in the Appendix of Forms, and Form 10 contains these words in brackets: "here set out the nature and date or dates of the act or acts of bankruptcy relied on." Secondly, the evidence and the correspondence shew that the petition was presented for a collateral purpose, and with the view of putting pressure on the debtor, and therefore it ought to be dismissed: Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7, sub-s. 3.

Muir Mackenzie, for the petitioning creditor. The statement that the bankruptcy notice was served personally upon the debtor on November 25 is a sufficient statement of the date of the act of bankruptcy relied on.

[VAUGHAN WILLIAMS, J. The registrar informs us that, according to the practice prevailing in the London Bankruptcy Court, such a statement as this of the date of the act of bankruptcy relied on is not regarded as sufficient.]

If the statement is insufficient, the defect is one which can be cured by amendment. The registrar of the county court ought to have amended at the hearing, and the Court can amend now: *In re Lorrimar, Ex parte Constable.* (1) If the petition were not presented bonâ fide, but for a collateral purpose, no doubt that would be a ground for dismissing it: *Ex parte Griffin, In re Adams* (2); but the evidence in the present case does not support that contention.

Kisch, replied.

VAUGHAN WILLIAMS, J. Two objections have been taken to this receiving order. The first is what is described as a technical objection; but I have no doubt that it is a good objection to the receiving order in one sense, namely, that the date of the act of bankruptcy ought to have been stated in the petition, in accordance with the form of creditor's petition given in Form 10 in the Appendix to the Bankruptcy Rules. That form states, in paragraph 4, "That A. B., within three

(1) 7 Morrell, 235. (2) 12 Ch. D. 480.

1894

IN RE DUNHILL. EX PARTE DUNHILL.

Vaughan Williams, J.

months before the date of the presentation of this petition, has committed the following act" [*or* "acts] of bankruptcy, namely," [*here set out the nature and date or dates of the act or acts of bankruptcy relied on.*] I do not think that this petition does state the date of the act of bankruptcy relied on, in accordance with the directions contained in that form. In the case of *In re Lorrimar, Ex parte Constable* (1), which was referred to by Mr. Muir Mackenzie, Cave and A. L. Smith, JJ., held that an order dismissing the petition must be discharged, and the case must go back to the registrar with a direction to amend. The statement of the act of bankruptcy which was held to be insufficient in that case was, "Non-compliance with a bankruptcy notice issued out of this Court on the 13th day of May 1890, and duly served upon the said Edward Lorrimar on the 13th day of the said month." The form which has been adopted in the High Court of Justice, in cases where the act of bankruptcy relied on is non-compliance with a bankruptcy notice, is as follows: "That (the debtor), within three months before the date of this petition, has committed the following act of bankruptcy, namely:—Has failed, before the 9th day of July 1890, to comply with the requirements of a bankruptcy notice, duly served on him on the 1st day of July 1890." (2) We find there the two dates, of July 9 and July 1. Those two dates give the interval of time which would have to elapse, from the date of the service of the bankruptcy notice, before the act of bankruptcy by non-compliance is committed, and in my opinion that is what ought to have been done in the present case. But then Mr. Muir Mackenzie asks us to put this right by amendment, and I have come to the conclusion that we ought to do so, for I think the Bankruptcy Act requires it. (3) The registrar of the county court, however, though he did not amend, did not dismiss the petition, but the case was heard before him on the merits. I agree with Mr. Muir Mackenzie that the registrar did wrong in not amending; but I think he would have done more wrong if he had dismissed the petition. Mr. Kisch contends, in support of

(1) 7 Morrell, 235.
(2) 7 Morrell, at p. 239.
(3) See 46 & 47 Vict. c. 52, s. 105, sub-s. 3; s. 143, sub-s. 1; Bankruptcy Rules, 1886, 1890, r. 350.

the second objection to the receiving order, that the bankruptcy proceedings in the present case were not bonâ fide taken in order to enforce a debt and obtain payment, but were taken from an indirect motive, with a view to put an improper pressure on the debtor. I agree with the doctrine of the case referred to on this point, *Ex parte Griffin, In re Adams* (1), and if I thought that the evidence here shewed any such pressure as is referred to in that case, I should be prepared to act on that doctrine. However, on the facts and the correspondence in the present case, I think the evidence does not shew any such pressure, and therefore that, on this second point, the registrar has arrived at a right conclusion.

For these reasons I am of opinion that this appeal ought to be dismissed.

KENNEDY, J., concurred.

Appeal dismissed.

Solicitors for the appellant, the debtor: *Beyfus & Beyfus.*

Solicitor for the respondent, the petitioning creditor: *Frederick Fitz-Payne, for Younge, Wilson & Co., Sheffield.*

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1894
Feb. 16.

IN RE HALLETT & CO. EX PARTE BLANE.

Bankruptcy—Assets—Following Trust Money.

Trustees of a fund, part of which was invested in debentures of a public company which were about to be paid off, authorized the bankrupts, a firm of private bankers with whom they had an account for the purposes of the trust, and who knew that the debentures belonged to the trust, to receive the proceeds of the debentures when paid off. The bankrupts having at the same time to pay a larger sum of money for other customers to the same company, did not receive the amount of the debentures in cash from the company, but gave their own cheque to the company for the amount due on balance, and credited the trust account with 1600*l.*, the full amount of the debentures paid off. Subsequently the bankrupts suspended payment, having at that time a balance exceeding 1600*l.* standing to the credit of their account with

(1) 12 Ch. D. 480.

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1894
IN RE HALLETT & Co.
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their own bankers, into which account they paid their daily receipts in their business:—

Held (reversing the decision of Vaughan Williams, J.), that the doctrine of following trust money did not apply, as the money secured by the debentures had not been paid by the company to the bankrupts nor by the latter to their bankers and was incapable of identification, and that the balance to the credit of the bankrupts with their bankers was therefore part of their estate and was subject to administration under the Bankruptcy Act.

In re Hallett's Estate (13 Ch. D. 696), considered.

APPEAL of the trustee in bankruptcy of Hallett & Co. from a decision of Vaughan Williams, J., declaring certain moneys standing to the credit of the bankrupts with their bankers not to be part of the estate of the bankrupts.

The bankrupts carried on business in co-partnership as bankers. Among their customers was a certain Captain Blane, who died in 1890, having appointed Lieutenant-Colonel Blane and William Charles Hallett, one of the bankrupts, to be the executors and trustees of his will; for the purposes of the executorship an account was opened with Hallett & Co., the bankrupts, which was used for the purpose of collecting the estate and paying the debts, and collecting the dividends for the widow, to whom the income of the estate was payable for life. Part of the trust estate consisted of debentures to the amount of 1600*l.* in a company called Hewitt & Co. (Limited), which matured for payment on December 31, 1892, and became actually payable on January 31, 1893. The trustees, having no power to renew the investment, signed an authority to the bank of Hallett & Co. to collect the money when paid off, and each of the trustees signed the receipt indorsed upon each debenture for the amount secured by it. Other customers of Hallett & Co. were debenture-holders in Hewitt & Co. and desired to renew their debentures, so that when the time arrived for renewal or payment of the debentures Hallett & Co. had to receive 1600*l.* from Hewitt & Co. on behalf of the trustees and to pay 1900*l.* to Hewitt & Co. on behalf of other customers for taking up new debentures. These amounts were not actually paid in specie, but were set-off against each other, the balance (300*l.*) being paid to Hewitt & Co. by the bankrupts' own cheque drawn upon themselves. The account of the trustees with Hallett & Co.

was then credited with 1600*l.*, and the accounts of the other customers debited with 1900*l.* A correspondence took place as to the re-investment of the money of the Blane trustees, but it had not been re-invested when Hallett & Co. suspended payment in May, 1893. Hallett & Co. had two private banking accounts of their own, one with Cocks, Biddulph & Co., the other with the National Provincial Bank of England, into which accounts they paid their daily receipts in their business. On February 3, 1893, there was a balance of upwards of 5000*l.* to the credit of the account of the bankrupts with Cocks, Biddulph & Co., and at the date of the stoppage a sum of 4171*l.* was standing to the credit of that account; there was also a small credit balance at the National Provincial Bank. Lieutenant-Colonel Blane now moved for a declaration that the 1600*l.*, being part of the trust estate, did not form part of the property of the debtors divisible among their creditors or subject to administration under the Bankruptcy Act; that the trust estate was entitled to be paid the 1600*l.* out of the funds and property then or thereafter in the hands of the official receiver or trustee representing the assets of or in the hands of the debtors' bankers at the date when they suspended payment; and for an order that the official receiver should out of the fund or property in his hands pay such sum to the applicant as the Court should direct.

1893. Nov. 11, 16, 17. *Muir Mackenzie*, for the motion. The case falls within the principle of *In re Hallett's Estate* (1) and *Marsh* v. *Keating*. (2) The 1600*l.* ought to have been invested at once. The bankrupts committed a breach of trust in lending the money to their bankers, Cocks & Co. All the partners are liable, as well as Hallett the trustee, because they knew it was trust money and they knew their bank was insolvent.

Reed, Q.C., and *Carrington*, for the respondent. *In re Hallett's Estate* (1) does not apply. Trustees can lawfully pay the capital of a trust fund into a bank of good repute pending an investment. No trust is created by the mere fact that bankers know that an account is a trust account. This was a loan of money to

(1) 13 Ch. D. 696. (2) 1 Bing. N. C. 198.

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bankers, and the money cannot be followed, especially where the borrowers are more than one person: *Ex parte Barnewall.* (1) [He also cited *Brown* v. *Adams.* (2)]

Muir Mackenzie, in reply.

Cur. adv. vult.

Nov. 25. VAUGHAN WILLIAMS, J. In this case the question is, whether Mrs. Mary Georgina Blane, the cestui que trust entitled to certain capital moneys left to trustees by the will of Captain A. R. Blane, is entitled to follow those moneys and claim to have them paid to her on the bankruptcy of the trustee and of the banking partnership in which such trustee was a partner, and into which bank the moneys in question were paid. The facts of the case are these. [The learned judge stated the facts, and continued:—] When the time came for paying off the debentures Messrs. Hallett & Co. had both moneys to receive on account of customers, holders of debentures, and moneys to pay Hewitt & Co. Limited on behalf of customers who chose to re-invest. The moneys payable exceeded by 300*l.* those receivable. The result was that Messrs. Hallett & Co. never received the 1600*l.*, the amount paid on the trust debentures, at all, but were only allowed that amount in the settlement of the transaction with Hewitt & Co. Hallett & Co. banked with the National Provincial and with Cocks, Biddulph & Co. In my judgment the current account of Hallett & Co. with Cocks, Biddulph & Co. became on February 3, 1893, in credit to the extent of 1600*l.* more than it would have been but for the payment off of these debentures. Messrs. Hallett & Co. failed on May 11, 1893, with a large amount of unsecured debts. From the time of the receipt of the 1600*l.* down to the failure of Messrs. Hallett & Co. the account of Messrs. Hallett & Co. was never in debit and never in credit for a less sum than 1600*l.* It seems to me, therefore, that if Mr. Hallett, the trustee, had banked with Cocks, Biddulph & Co. and mixed the trust moneys with his own moneys in the banking account, and then became bankrupt, the decision in *In re Hallett's Estate* (3) shews that this 1600*l.* could be identified and followed

(1) 6 D. M. & G. 795, 801. (2) Law Rep. 4 Ch. 764.
(3) 13 Ch. D. 696.

as the trust money, and further shews that the rule in *Clayton's Case* (1) would not apply, but that by reason of the paramount rule that a man must be supposed to have drawn out money, which he was honestly entitled to draw out, rather than trust money which he was not entitled to use, 1600*l.* of the 4000*l.* odd standing to the credit at the date of the failure must be deemed to be 1600*l.* of trust money. Now, that being so, how is the matter affected by the fact that Mr. Hallett was one of the two co-trustees, that the co-trustees paid the money into a bank in which Hallett was a partner, and that that bank in which Hallett was a partner paid the money into their account with Cocks, Biddulph & Co.? The answer to this question seems to me to depend on whether the money when received by Hallett's bank was received by them as trust money or as a loan simply. If it was received as trust money, then by the very terms of s. 44 of the Bankruptcy Act, 1883, this money, being trust money, would not pass to the creditors of the bankrupts. It was contended by Mr. Mackenzie that the money in question was received by Messrs. Hallett & Co. as agents, and not as bankers. I am, however, clearly of opinion that Messrs. Hallett & Co. received the money as bankers, and it seems to me that the money must be held to be part of the general estate of Messrs. Hallett & Co. distributable amongst their creditors, unless it can be shewn that the money was received by them with notice of the breach of trust. If it was received with such notice it remained trust money in their hands, notwithstanding the fact that they received it as bankers. Now, a trustee is entitled pending investment to pay money into a bank for safe custody, that is, temporarily to lend the money to a bank, provided he identifies the money as trust money and pays it in to a trust account. But the bank must be a responsible bank. A trustee paying money into a bank which he knows, or ought to know, not to be responsible, is guilty of a breach of trust. In my opinion Mr. Hallett, the trustee, was guilty of a breach of trust when he ordered this money to be collected by Hallett & Co., and I think that all the partners in the bank had notice of the breach of trust, because they all must be taken to have known that the money was trust

(1) 1 Mer. 572.

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money, and to have known of the financial condition of the bank.

H. L. F.

Feb. 16. The trustee appealed.

Herbert Reed, Q.C. (*Carrington*, with him), for the appellant. The doctrine of following trust money is inapplicable to the present case. Before it can be applied it must be shewn that the money existed in specie, and that it was paid into the account of the bankrupts with Cocks & Co. The primary consideration in applying the doctrine is whether the money can be traced; this cannot be done. The learned judge has found as a fact that the relationship between the bankrupts and the trustees was that of banker and customer, that is, that the bankrupts received the money as a loan; and there is no authority to shew that the fact that the bankrupts received it with knowledge of a breach of trust affects the question. [He cited *Frith* v. *Cartland*. (1)]

Muir Mackenzie, for the respondent. Admitting that there must be a specific thing capable of being traced, this money can be, and was in fact, traced by the learned judge in the Court below. First, the 1600*l.* was in fact received by Hallett & Co. from Hewitt & Co.

[DAVEY, L.J. No; all that happened was that they got a credit for that amount.]

Having regard to modern forms of business, the payment of the cheque for 300*l.* was the same as though there had been cross payments for 1900*l.* and 1600*l.* respectively. Secondly, the 1600*l.* was paid by the bankrupts into their account with Cocks, Biddulph & Co., for but for this transaction they would have had 1600*l.* less to use for the general purposes of their business. The balance of the bankrupts at Cocks, Biddulph & Co.'s never fell below 1600*l.*, and it must be inferred that they drew on their own moneys, leaving this money, which to their knowledge was trust money, intact.

LORD ESHER, M.R. I am of opinion that this appeal should be allowed. In order to arrive at this conclusion it is only

(1) 2 H. & M. 417; 34 L. J. (Ch.) 301.

necessary to follow closely the steps of this transaction. The real question is, whether the executor and trustee of Captain Blane is merely a creditor entitled to prove against the estate of Messrs. Hallett & Co., or whether he is something more. Now Colonel Blane, as trustee under his brother's will, had a legal interest in certain debentures of Hewitt & Co., and in the proceeds of those debentures which he held in trust for the widow. He had as such trustee an account with the bank of Hallett & Co., and as their customer he authorized them to receive the proceeds of the various trust investments and pay them into the banking account; the course of business being that Hallett & Co. credited his trust account with the amount, while the money received became their money to be used as they liked, either for the ordinary purposes of the bank or not. Certain debentures, the property of Colonel Blane as trustee, were falling due and were to be paid off, and he signed certain papers or receipts which admittedly amounted to an authority to Hallett & Co. to receive the capital of the debentures. The learned judge in the Court below has found that that authority was given to Hallett & Co. as bankers and not merely as agents; it stood on precisely the same footing as their authority to receive dividends for the trust. The authority of Hallett & Co. was therefore to receive the capital money from Hewitt & Co., and to credit the account with a similar sum; the money became theirs, and they became debtors to him, not as a trustee, but as their customer. They had a right, if nothing else happened, to use the money as they pleased, and they did use it in a transaction between themselves and Hewitt & Co. on behalf, not of Colonel Blane alone, but of several of their customers. Now it is only fair to say that when Colonel Blane gave Hallett & Co. authority to receive this money, they knew as a fact that he was a trustee; and although the result of the transaction was only to make them debtors to their customer, yet if the money, which was trust money, could be followed, and if it could be shewn what was done with that actual money, the doctrine of following trust money would apply. But that is the difficulty in the case. Can Colonel Blane, by virtue of the authority which he gave, shew that Hallett & Co. did actually receive the money, and further shew

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where it is now? Hallett & Co. did not in truth receive any money; they entered into a transaction with Hewitt & Co., the result of which was that no money passed; although in one sense Hewitt & Co. put Hallett & Co. in the position of being unable to say to Colonel Blane that they had not received the money, yet Hallett & Co. did not in fact receive any money or tender of money or anything tangible which it would be possible to follow or to lay hands upon. Had there been anything in existence representing that which the bankers were authorized to collect, Colonel Blane might have followed it; but he cannot shew that; he can only shew a transaction between Hallett & Co. and other persons. All that can be shewn is a settlement of account, and a settlement of account cannot be followed. Colonel Blane is therefore only a creditor of Messrs. Hallett & Co., and must prove against their estate like the other creditors.

LOPES, L.J. I am of the same opinion. If trust money can be traced, it is liable to be followed by the trustee, and will not pass to the trustee in bankruptcy; but if it has been mixed up with other money so as not to be distinguishable, it cannot be followed. So far as regards the following of this sum of 1600*l.*, the attempt fails at the first stage, for that particular 1600*l.* was never received by Hallett & Co.; no money had passed; there had been a mere settlement with Hewitt & Co. Then, again, this specific sum never passed on to Cocks, Biddulph & Co.; and the second stage fails too. The money was not ear-marked, and cannot be identified, and Colonel Blane has, therefore, no larger rights than any other creditor of Hallett & Co.

DAVEY, L.J. I agree. There is nothing in our decision in the present case which is in conflict with the decision in *In re Hallett's Estate.* (1) In order to follow trust money, there must be specific property capable of being identified, into which the money has been converted, and in that case this doctrine was applied in this way; it was said that, where a trustee pays his own money and also trust money into his banking account, it is the same thing as though he had placed them in a box, and his

(1) 13 Ch. D. 696.

drawings for his own purposes must be assumed to be out of his own money. That decision in no way qualifies the rule that there must be a specific thing capable of being followed.

Now, two points have been urged on behalf of Colonel Blane; first, that this money had been received by Hallett & Co. from Hewitt & Co.; secondly, that it had been paid in to Hallett's account at their bankers, Cocks, Biddulph & Co., and I assume that he would be entitled to succeed upon these proceedings if he could prove them; I think, however, that he fails to prove either proposition. I have no doubt that, for the purpose of making them the debtors of Captain Blane's trustees, this money was received by Messrs. Hallett & Co.; but it was not received by them in any sense which is material to the present purpose. Nothing was received by them in specie, notes, cheques, or coin; there was no credit existing in specie, nothing which the cestui que trust could follow and say that the property had been converted into. All that happened was, that Hallett & Co., having to pay to Hewitt & Co. 1900*l.* for their customers, and having to receive 1600*l.* from them for Captain Blane's trustees, the two sums were set off against each other, and a cheque given for the balance of 300*l.* But let us assume that Hallett & Co. received —I put it as strongly as possible—in sovereigns or a cheque on the Bank of England, the 1600*l* from Hewitt & Co., into what was the money converted? Was it lent to Cocks, Biddulph & Co. so as to be part of the debt which they, as their bankers, owed to Hallett & Co.? It clearly never was; it was applied by Hallett & Co. in paying, on behalf of other customers, 1600*l.* to Hewitt & Co., for which they got a credit from their other customers. That was the substance of the transaction; they got credit for 1600*l.*, and gave credit to the Blane trustees for 1600*l.* as having been received on their account. I do not see how, by this transaction, the assets of Hallett & Co. were increased by a single penny; for, if the debt due to the Blane trustees was increased, on the other hand their debt to their other customers was diminished by an equivalent amount. The 1600*l.* was never paid by Hallett & Co. into Cocks, Biddulph & Co.'s in any form, nor was it ever lent to them in any shape; nothing representing that 1600*l.* ever got into their possession

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EX PARTE BLANE.

Davey, L.J.

on account of Hallett & Co., and the latter never got credit from the former for that sum in their account. Speaking for myself, it seems manifest that the account at Cocks, Biddulph & Co.'s was not increased by 1600*l.*; the view that it was so increased, appears to be based on the ingenious argument that if Hallett & Co. had not paid that sum by means of this set-off, they must have drawn upon Cocks & Co. for the amount; it by no means, however, follows that they would have done so. What has been done in the present case is insufficient to satisfy the requirements as to the following of trust money. The second proposition on behalf of Colonel Blane is absolutely unfounded, and the answer to it is that Hallett & Co. did not draw on Cocks, Biddulph & Co. for 1600*l.*, nor did they pay that amount into their bank; if they drew upon anybody for the amount, it was upon the credits of their other customers. It is unnecessary to consider whether there has been a breach of trust, as I am unable to see how it affects the question before the Court.

Appeal allowed.

Solicitors for appellant: *Rooper & Whately.*
Solicitors for respondents: *Norton, Rose, & Co.*

W. J. B.

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April 6.

[IN THE COURT OF APPEAL.]

IN RE CRONMIRE. EX PARTE CRONMIRE.

Bankruptcy—Public Examination of Bankrupt—Order to file account of Bankrupt's dealings in a Business alleged to have been carried on by him under another name—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 17—*Bankruptcy Rules,* 1886, *rr.* 6, 338.

At the public examination of an undischarged bankrupt, he was questioned about a business which it was alleged that he had, since the date of the receiving order, been carrying on under a name not his own. He asserted that this business was not his, but was his wife's, and that he had only acted as her clerk. The registrar did not believe the bankrupt's statements, and, on the application of the official receiver, ordered the bankrupt to file an account of his dealings in the business in question. This order was made without any notice to the bankrupt's wife, who was not present:—

Held, that the registrar had jurisdiction to make the order; that it did not amount to a final adjudication upon the title to the business; and that, if

an application were made to the Court to commit the bankrupt for disobedience to the order, it would still be open to him to prove that the business belonged to his wife.

Appeal by Sidney Cronmire, a bankrupt, against an order made by one of the bankruptcy registrars, that the bankrupt should file an account of his dealings as W. Freeman.

On December 5, 1885, a receiving order was made against the debtor, who had carried on business as an outside stockbroker. He was afterwards adjudicated a bankrupt. On March 31, 1886, an order was made adjourning his public examination sine die. In 1894, the official receiver was informed that the bankrupt (who had not obtained his discharge) had, since 1891, been carrying on the business of an outside broker under the name of "W. Freeman." In consequence of this information the official receiver obtained an order for the public examination of the bankrupt, and the examination took place on March 8, 1894. In the course of his examination the bankrupt was questioned about the business of "W. Freeman." The bankrupt asserted that the business was not his, but his wife's, and that he had only acted as her clerk. The official receiver was not satisfied with the bankrupt's statements, and asked the registrar to order him to file an account of his dealings as "W. Freeman." No previous notice had been given of this application, and the bankrupt's wife was not before the Court. The registrar did not believe the bankrupt's statements, but came to the conclusion that the business of W. Freeman had really been carried on by him. The registrar accordingly made the order now appealed against, that, the Court being of opinion from the bankrupt's examination that he had traded as W. Freeman, the public examination be adjourned till April 5, 1894, and that the bankrupt do on or before March 22 file an account of his dealings as W. Freeman.

The bankrupt appealed.

Herbert Reed, Q.C., and *F. Cooper Willis*, for the bankrupt. (1.) The registrar had no jurisdiction to make such an order upon the public examination of the bankrupt. The order in effect determines the title to the business, which primâ facie did

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IN RE CRONMIRE.
EX PARTE CRONMIRE.

not belong to the bankrupt. Such an order could not properly be made except upon an application for the purpose, notice of which had been served upon the wife. The public examination of a debtor under s. 17 (1) of the Bankruptcy Act, 1883, is held only for the purpose of obtaining information as to the debtor's conduct and affairs. The wife had no right to be present at the examination. In fact, the registrar has no power to determine a question of title; rule 6 (*e*). An application should have been made by the official receiver under rule 338 of the Bankruptcy Rules, 1886.

[LORD ESHER, M.R. The order decides nothing as against the wife.]

(1) By s. 17: "(1.) Where the Court makes a receiving order it shall hold a public sitting, on a day to be appointed by the Court, for the examination of the debtor, and the debtor shall attend thereat, and shall be examined as to his conduct, dealings, and property.

"(4.) Any creditor who has tendered a proof, or his representative authorized in writing, may question the debtor concerning his affairs and the causes of his failure.

"(5.) The official receiver shall take part in the examination of the debtor; and for the purpose thereof, if specially authorized by the Board of Trade, may employ a solicitor with or without counsel.

"(6.) If a trustee is appointed before the conclusion of the examination he may take part therein.

"(7.) The Court may put such questions to the debtor as it may think expedient.

"(8.) The debtor shall be examined upon oath, and it shall be his duty to answer all such questions as the Court may put or allow to be put to him. Such notes of the examination as the Court thinks proper shall be taken down in writing, and shall be read over to and signed by the debtor, and may thereafter be used in evidence against him; they shall also be open to the inspection of any creditor at all reasonable times."

By the Bankruptcy Rules, 1886, r. 6: "The following matters and applications shall be heard and determined in open Court, namely (inter alia) (*e*) applications to set aside or avoid any settlement, conveyance, transfer, security, or payment, or to declare for or against the title of the trustee to any property adversely claimed."

By rule 338: "The debtor shall, on the request of the official receiver, furnish him with trading and profit and loss accounts, and a cash and goods account, for such period not exceeding two years prior to the date of the receiving order as the official receiver shall specify. Provided that the debtor shall, if ordered by the Court so to do, furnish such accounts as the Court may order for any longer period. If the debtor fails to comply with the requirements of this rule, the official receiver shall report such failure to the Court, and the Court shall take such action on such report as the Court shall think just."

But it might be used to the bankrupt's prejudice, and the official receiver is not entitled by obtaining such an order to shift the onus of proof of the title to the business. After this expression of the opinion of the Court the bankrupt would be estopped from saying that the business of W. Freeman was not his, and if he disobeyed the order he would be liable to committal, even though it was impossible for him to obey it. And if the books of W. Freeman had not been properly kept, the bankrupt's position in applying for an order of discharge would be seriously affected. He could not then be heard to say that those books were not his books. Again, if under s. 31 he were charged with obtaining credit to the extent of 20*l.* or upwards, without informing the creditor that he was an undischarged bankrupt, which is by s. 31 made a misdemeanour, this order might be used against him as shewing that he had committed the offence.

[LORD ESHER, M.R. Would the order be evidence against him?]

Strictly speaking it might not. But orders of the Court of Bankruptcy are generally put in as evidence in criminal proceedings of that kind.

Muir Mackenzie, for the official receiver. The registrar disbelieved the bankrupt's assertion that the business of W. Freeman was not his, and his admissions were such as to give rise to suspicion that the business was really his. There is practically no difference between a direct admission by the bankrupt that the business of W. Freeman was his and an admission of facts from which the irresistible inference was that the business was his. In the former case the order to file accounts would clearly have been right. The order has no effect as against the wife. It is merely an adjudication for the purpose of ordering the bankrupt to file an account. Upon an application to the judge to commit the bankrupt for contempt in disobeying the order, it would still be open to him to shew that the business of W. Freeman was not his, and if the judge were then satisfied that the business was not the bankrupt's, he would not make an order for committal. A motion for a declaration as to the title to the business would be made as

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against the wife; there could not be such a motion as against the bankrupt.

The provisions of s. 28 as to not keeping proper books of account apply only to a period before the date of the receiving order.

F. Cooper Willis, in reply. Upon a motion to commit the bankrupt for contempt for disobedience to the order, he could not be heard to say that the business of W. Freeman was not his business.

LORD ESHER, M.R. Under s. 17 of the Bankruptcy Act, 1883, this debtor, who had been adjudicated a bankrupt, attended to be examined as to his conduct, dealings, and property. The public examination is held before an officer of the Court for the purpose, and the sole purpose, of the debtor being examined. Nothing is to be determined or concluded against him or for him upon this examination. The Court is only collecting from him evidence upon which it may afterwards act with regard to him in such manner as it thinks fit. The examination is a mere mode of obtaining evidence from the bankrupt himself. The registrar is to conduct the examination; but he has no power to call witnesses. He has only to sit there and conduct the examination, and to collect the answers of the debtor to the questions put to him. The registrar must, no doubt, determine whether the questions which it is proposed to put to the debtor are proper questions, and whether they are or are not put in a proper form. The registrar has to regulate the examination—to determine what questions are properly put and what questions cannot be put, and to enforce upon the debtor, as far as he can, at that time, in that place, and for that purpose, his obligation to answer; but it is a mere mode of collecting evidence. Now, for the purpose of collecting evidence, the bankrupt is to be asked, and he is to answer, all necessary questions respecting his conduct, his dealings, and his property. It would be the duty of the registrar to say, "You may ask him any proper questions with regard to his own dealings, but you must not ask him, and you cannot oblige him to answer, any questions with regard to any other person's dealings." The registrar must determine whether

the questions are rightly put, and whether the debtor ought to answer them. For that purpose the registrar must determine whether the questions put relate to the dealings of the debtor, or to the dealings of some one else. But the registrar cannot finally determine anything. He cannot even finally determine whether the questions which he allows to be asked are or are not proper questions. Just in the same way as where there is a commission to obtain evidence abroad, the commissioner must for the time determine whether any question is or is not a proper one to put; but, when he has done so, and when the commission is brought before the Court, the Court may say, "Although the commissioner has allowed this question to be asked, we think that it was not a proper one, or that it was immaterial. We therefore take no notice of it, and strike out the question and the answer." So here, where the registrar, at the public examination for the purpose of collecting evidence from the debtor himself as to certain matters, determines, for that purpose and at that time, that a business with regard to which a question is asked is the business of the debtor, in my opinion he does so only to the extent necessary for that purpose and for that time, and not for any other time or for any other purpose; and when the evidence goes before the Court in order that it may act upon it, the Court is entitled to say, "The registrar was mistaken in supposing that this business was the debtor's business, and that these dealings were his dealings. They were not." It would not be an appeal from the registrar's decision at the time; but the Court, having to determine the matter finally, would not act upon the temporary decision of the registrar, which was not a final adjudication of the matter. This, I think, is made perfectly clear by r. 338, which says that "the debtor shall, on the request of the official receiver, furnish him with trading and profit and loss accounts, and a cash account and goods account for such period not exceeding two years prior to the date of the receiving order as the official receiver shall specify Provided that the debtor shall, if ordered by the Court so to do, furnish such accounts as the Court may order for any longer period" (that is, for a longer period than two years prior to the date of the receiving order). "If the debtor fails to comply with the requirements of this rule,

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Lord Esher, M.R.

the official receiver shall report such failure to the Court, and the Court shall take such action on such report as the Court shall think just." Here the suggested failure of the debtor is, that he may not as directed by the order file accounts with regard to the business carried on under the name of W. Freeman. This failure would then be reported by the official receiver to the Court, "And the Court shall take such action on such report as the Court shall think just." That gives to the Court the greatest possible power. There is no question of appeal from what the registrar has done; the question is one with which the Court will deal at a later stage of the proceedings.

But it is said that this order compels the debtor, although in truth the business of W. Freeman is not his, to furnish the accounts relating to it, and that, if he fails to do so, the Court would have no power to consider whether the business was really his or not. If, therefore, it is said, the business is another man's business, the debtor must, if he wishes to be safe, get that other man to supply him with an account of his transactions, so that the debtor may be able to file those accounts, not of his own knowledge, but as given to him by the other man with regard to that man's business which is not the debtor's business. That is not the way to construe a business Act of Parliament. It is absurd to suppose that this is what the legislature intended. It would be impossible for the debtor to file accounts of another man's business, and it never could have been intended that he should do so. But, nevertheless, it is said, because the registrar has ordered it to be done, the Court must proceed against the debtor by way of contempt for not doing that which it is impossible that he can do, and which it cannot be supposed that the legislature intended that he should do. That, as it seems to me, would be contrary to every notion of law and of justice. I have not the smallest doubt that the proper thing for this debtor to do, or that he will inevitably do so, if he persists in saying that the business of W. Freeman is his wife's, will be to say, "The business is my wife's; it is not mine. I cannot tell you what her transactions were, and, even if I knew as her clerk what her transactions were, I would not tell you." Then when the official receiver reports this to the Court, the Court will "take such action as it shall

think just." If the Court believes the debtor it will not commit him for contempt, and will not compel him to answer that which in justice he is not bound to answer, and which he cannot answer. The objections which have been suggested by the ingenuity of astute counsel can never really arise, and, if this business is really not the debtor's, the order will do him no harm.

In my opinion, this supposed adjudication of the registrar, at the time at which and under the circumstances in which it was made, is nothing but a temporary adjudication in the course of the examination, for the momentary purpose of determining whether the answers ought to be given or not, and is not a final adjudication whether this business was or was not the business of the bankrupt. In my opinion, therefore, the appeal should be dismissed.

A. L. Smith, L.J. The circumstances, at any rate, created a strong suspicion that the business of W. Freeman was really the business of the bankrupt, and not, as he said, the business of his wife. The registrar, having heard the examination of the bankrupt, came to the conclusion that it was his duty, in the interest of the bankrupt's creditors, to find out what (if any) were the assets which the bankrupt had been receiving from the business which had been carried on under the name of William Freeman. So far, it seems to me obvious that the registrar was right. It was conceded by Mr. Willis that, if the bankrupt had admitted that the business carried on under the name of William Freeman was his business, this order for accounts would have been a good one. But it is said, that, because the bankrupt denies that the business is his, when his other answers would lead any reasonable man to the conclusion that it is his, this order for accounts cannot be made. If I thought that this order for ever concluded the bankrupt as to whether he was carrying on, and had carried on, business under the name of William Freeman, it may be that I should not arrive at the judgment which I am now delivering. But, as my Lord has pointed out, this order is not what has been called an "adjudication." The learned registrar, who was conducting this examination, and who was bound to see that it was carried on properly, came to the conclusion that there was at

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EX PARTE CRONMIRE.

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any rate a primâ facie case made out that "William Freeman" was really the bankrupt himself, and made this order for accounts. The order does not bind the debtor hereafter. There was ample evidence upon which the registrar might come to that conclusion, and it was, I think, a proper order to be made at the time. I can see the difficulty in which the bankrupt is placed by the order, for it is obvious he must do one of two things. He must make up his mind (and he of all men knows what the truth is) whether "William Freeman" is himself or not. If he makes up his mind that William Freeman is not himself, and does not render the accounts, and it should turn out afterwards, upon an application being made to the judge to commit him, that he has told an untruth, and that William Freeman is himself, I should not be surprised if he is sent to gaol. If, on the other hand, it be true that "William Freeman" is the bankrupt's wife, not himself, and he has nothing to do with the business, and he disobeys the order, then the learned judge will, under rule 338, "take such action as the Court shall think just." If the Court should come to the latter conclusion the order will be no estoppel, for if "William Freeman" is not the bankrupt, it would be manifestly unjust that he should be committed for contempt, and he will certainly not be committed. It seems to me, therefore, that this appeal against the order of the registrar, as having been made without jurisdiction, fails. The order is not a declaration "for or against the title of the trustee to any property adversely claimed," within the meaning of rule 6 of the Bankruptcy Rules, 1886. It is only a ruling at the time, for the purpose of conducting the examination properly, that these further accounts must be delivered.

DAVEY, L.J. I agree, and I will only add that the way in which the case strikes my mind is this. In the course of the examination of the bankrupt, it appeared to the registrar, in the exercise of his duty, that further information was required by the production of certain accounts, and he thereupon made an order for that purpose. I regard this order as growing out of, and in a sense being part of, the examination of the bankrupt. If that be the true view of the order, it cannot be a conclusive

or final adjudication, even as between the bankrupt and the official receiver. Mr. Muir Mackenzie has fully admitted, and in my opinion rightly, that, if the bankrupt declines to produce these accounts, and says that the books are not under his control, and that without the consent of the person to whom they belong he cannot furnish the accounts, it will be open to him to shew affirmatively by evidence that, notwithstanding the statements in his answers upon which the registrar acted, the business was not in fact his, but that of his wife. If that be so, I think the objections to this order, which have been so powerfully urged by Mr. Reed, vanish. Our decision is based upon the assumption that, if and when the matter comes before the Court on a motion to commit the bankrupt for non-compliance with the order, it will still be open to him to contest the question whether he ought to be called upon to produce these accounts.

LORD ESHER, M.R. I should like to add this. When at the trial of an action a question is put to a witness, and the objection is taken that the question is one which ought not to be asked, the judge, in order to determine at the moment whether the question is a proper one, must often decide that question on the facts as they then appear to him. He decides it in one way, and afterwards, in the course of the same trial, the evidence shews that he so decided wrongly. When the case comes before the Court, to say whether the judge was right or wrong in allowing the question to be put, the Court will say that the ruling of the judge upon the facts as they appeared to him at the time, did not preclude his leaving the very same question afterwards to the jury on other evidence. That is analogous to what the registrar has done in this case.

Appeal dismissed.

Solicitors: *Joseph Davis; Solicitor to the Board of Trade.*

W. L. C.

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April 7.

[IN THE COURT OF APPEAL.]

IN RE HALLETT & CO. EX PARTE COCKS, BIDDULPH & CO.

Bankruptcy—Secured Creditor—Promissory Note—Guarantee—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 168.

H. & Co. lent a sum of money, receiving from the borrower a promissory note for the amount of the loan, together with the guarantee of a company, who thereby undertook to pay "to H. & Co., or the holders of the promissory note for the time being," the amount of the note if not paid at maturity. H. & Co. indorsed the promissory note, and handed it, together with the guarantee, to the appellants, their bankers, who gave them credit for the full amount of the note. The note was dishonoured at maturity, and H. & Co. became bankrupts. The appellants sought to prove in the bankruptcy as unsecured creditors for the amount due to them by H. & Co.:—

Held (reversing the decision of Vaughan Williams, J.), that all the beneficial interest in the guarantee must be taken to have passed to the appellants, so that they were not "persons holding a mortgage, charge or lien on the property of the debtors, or any part thereof"; that they were therefore not secured creditors in respect of the contract of guarantee within the meaning of s. 168 of the Bankruptcy Act, 1883, and were entitled to prove as unsecured creditors for the full amount of their debt without deducting the value of the guarantee.

APPEAL of Messrs. Cocks, Biddulph & Co. from a decision of Vaughan Williams, J., affirming the rejection by the trustee of their proof upon the ground that they were secured creditors, and must deduct the value of their security from the amount of their debt.

The bankrupts, Messrs. Hallett & Co., carried on business as bankers, and themselves had a banking account with the appellants, Messrs. Cocks, Biddulph & Co. On November 10, 1892, the Agence Dalziel, Limited, gave to Hallett & Co. a promissory note payable at six months' date for 16,000*l.*, the amount of a loan from the latter. Hallett & Co. requiring further security for the amount of the loan, a written contract of guarantee was on the same day entered into by the National Insurance and Guarantee Corporation, Limited, by which, in consideration of a sum of money paid to them by the Agence Dalziel, they guaranteed to pay "to Messrs. Hallett & Co., or the holders for value of the promissory note for the time being, the said sum of 16,000*l.* and interest thereon," if that sum was not paid by the Agence Dalziel when the note fell due. Hallett & Co. then indorsed the promissory note in blank, and handed it together with the guarantee

to the appellants, who gave them credit for the full amount of the note. The promissory note was dishonoured at maturity; the National Insurance and Guarantee Corporation went into liquidation, and Hallett & Co. became bankrupt. Cocks, Biddulph & Co. sent in a proof as unsecured creditors for 12,581*l.* 5*s.* 7*d.*, being the balance due to them from Hallett & Co. on their current account. The trustee rejected their proof on the ground that Cocks, Biddulph & Co. were secured creditors in respect of the guarantee, and were bound to deduct its value, and prove only for the balance. Cocks, Biddulph & Co. appealed.

March 20. *Farwell, Q.C.*, and *Vernon R. Smith*, for Cocks, Biddulph & Co. This guarantee is in no sense a "mortgage, charge or lien" on the property of the bankrupts within the meaning of s. 168 (1) of the Bankruptcy Act, 1883. Neither is it any part of the property of the bankrupts. Under the circumstances it operates simply as though it were another name on the promissory note, and the benefit of it passes with the note to the holder for the time being of the note: *Ex parte Schofield.* (2)

Herbert Reed, Q.C., and *Whately*, for the trustee. This guarantee falls within the rule that if bills of exchange are deposited as collateral security they are only a security in the hands of the depositee, and remain the property of the depositor: *Ex parte Brunskill.* (3) It was undoubtedly at one time the property of the bankrupts, and they deposited it with Cocks & Co. as collateral security for the moneys advanced to them on the promissory note. If they repay Cocks & Co., they can have the guarantee back and can sue the Agence Dalziel on it. It is a security forming part of their property which ought to be valued and deducted from the proof: *Ex parte Brett* (4); *In re Turner* (5); *In re Barned's Bank* (6); *Ex parte Twogood* (7)

Farwell, Q.C., in reply.

(1) By s. 168 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52): "Secured creditor means a person holding a mortgage, charge or lien on the property of the debtor, or any part thereof, as a security for a debt due to him from the debtor."

(2) 12 Ch. D. 337.
(3) 2 M. & A. 220.
(4) Law Rep. 6 Ch. 838.
(5) 19 Ch. D. 105.
(6) Law Rep. 10 Ch. 198.
(7) 19 Ves. 229.

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EX PARTE COCKS, BIDDULPH & Co.

VAUGHAN WILLIAMS, J. I think that the view of the trustee here is right. To my mind it is quite plain that this document, whether you call it a policy of insurance or whether you call it a guarantee, was part of the property of the bankrupts, which was transferred to Messrs. Cocks, Biddulph & Co. as security for the advance that they made to Messrs. Hallett. I have no more doubt that this guarantee or policy, whatever it may be properly called, is a part of the property of the bankrupts than I have that the promissory note was part of their property. They had a right to sue on the promissory note, and, if the promissory note was not paid, then they had the right to sue both on the promissory note and also on the guarantee. It is said that the fact that the guarantee was paid for with the money of the Agence Dalziel, and was not paid for with the money of Hallett & Co., makes a difference. But, at the same time the Agence Dalziel parted with the guarantee, and it became pro tanto the property of Messrs. Hallett. It was part of the security of Messrs. Hallett & Co. which they derived from the Agence Dalziel, and as such was part of their property. I think the decision was quite right, and the appeal must be dismissed with costs.

H. L. F.

Messrs. Cocks, Biddulph & Co. appealed.

April 7. *Farwell, Q.C.*, and *Vernon R. Smith*, for the appellants. *Herbert Reed, Q.C.* (*Whately*, with him), for the respondent.

The arguments were in substance the same as in the Court below.

LORD ESHER, M.R. I am unable to concur in the reasoning of the learned judge in the Court below, and think that this appeal must be allowed. When carefully looked at the transaction is perfectly clear. Hallett & Co. had lent money to the Agence Dalziel; the position of these two parties towards each other is not really material; the situation must be considered at the time when the transaction was entered into between Hallett & Co. and their bankers, Cocks, Biddulph & Co. At the time,

Hallett & Co., being the owners of a promissory note for £16,000, went to Cocks, Biddulph & Co. and said, We have a promissory note; will you put us in credit for the amount? This must mean, Will you discount the promissory note for us? Not in the sense of allowing or charging a discount, for a banker may discount a negotiable security without making any charge for doing so, but discounting in the sense that Hallett & Co. were to be put in credit to the amount of the note on passing the property in the note to Cocks, Biddulph & Co. The latter then agreed to lend the money to Hallett & Co. upon having the promissory note indorsed to them. It was so indorsed, and that was done with the intention that Cocks, Biddulph & Co. should do as they liked with the note. But the latter were not willing to lend their money or to discount the promissory note without something more; whereupon Hallett & Co. said, "We have a contract with the guarantee corporation, which we will give you, not with the intent that you shall merely hold it, and not act upon it without reference to us, but for you to do what you like with it." It is true that the property in that contract cannot pass by indorsement; but if Hallett & Co. handed it over, intending the benefit of the contract to be in the bankers, the property in it passed in this sense, that at common law Hallett & Co. would have been bound to lend their name to Cocks, Biddulph & Co. to enable them to sue upon it; while if Hallett & Co. brought an action upon it in their own name and on their own behalf, the action would have been stopped on the ground that they were bare trustees for Cocks, Biddulph & Co. In equity, however, there is not a doubt that the latter would be considered as owners of that contract and entitled to sue on it. In bankruptcy equitable doctrines are applied, so that, in the view of equity, what Hallett & Co. have done is this: they have indorsed the promissory note so as to pass the property in it, retaining no interest in it themselves, and they have passed on the contract with the guarantee corporation so as to have no right to deal with it themselves, having transferred the benefit of it to Cocks, Biddulph & Co. No doubt they have given the latter something which may be a security to them; but does it make them secured creditors?

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IN RE HALLETT & Co.
EX PARTE COCKS, BIDDULPH & Co.

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Now, the expression "secured creditor" is defined in s. 168 of the Bankruptcy Act of 1883, and it should be noticed that that definition does not say that the expression "includes" certain things, but that it "means" certain things; that is, it means nothing else than those things there specified. Under that definition it means a person holding, not a security in the widest possible sense of that term, but a mortgage, charge or lien on the property of the debtor as a security for a debt due to him by the debtor. Now, this contract with the guarantee corporation being handed on by Hallett & Co., with the intention that in equity it should become the contract and property of Cocks, Biddulph & Co., cannot be said to have been handed to them by way of mortgage, charge or lien on their debtor's property. The proposition on behalf of the trustee cannot in my opinion be stated so as to make it sensible, and Cocks, Biddulph & Co. are not, within the meaning of the Bankruptcy Act, secured creditors of the bankrupts.

A. L. SMITH, L.J. I am of the same opinion. Cocks, Biddulph & Co. had put in a proof against the estate of Hallett & Co. for 12,581*l.*, which was rejected by the trustee, it being said that Cocks, Biddulph & Co. were secured creditors, and that they had not valued their security. The sole point is whether Cocks, Biddulph & Co. are persons holding a mortgage, charge or lien on the property of Hallett & Co. as a security for a debt due from them. In my opinion the case does not fall within any of the terms of the definition clause. I need not recapitulate the facts, which have been fully analyzed by the Master of the Rolls, and I entirely concur in his conclusion that as a fact the contract by the guarantee corporation was not handed over to Cocks, Biddulph & Co. by way of a mortgage, charge or lien on Hallett & Co.'s property.

The next question is, What is the meaning of holding a mortgage, &c., "on the property of the debtor?" It can only mean on his property at the date of the bankruptcy. On the facts, it is obvious that both the contract of guarantee and the promissory note had ceased to be the property of the debtor at a date long anterior to the bankruptcy

Davey, L.J. I am of the same opinion, and, but for the view taken by the learned judge in the Court below, I should have said that this was a plain case. The question is, whether Cocks, Biddulph & Co. are secured creditors. They were the indorsees of a promissory note for 16,000*l.*, drawn by the Agence Dalziel, for which they had paid the full amount for which it was drawn, and they were also transferees of a contract of a guarantee society by which the latter undertook to pay the amount of the promissory note if the Agence Dalziel failed to pay it when it became due. On behalf of the trustee, it is said that Cocks, Biddulph & Co. were merely mortgagees or pledgees of the promissory note or the contract; and if this could be made out, it might be said that there was an equity of redemption in the bankrupts. But the evidence does not support this contention; the facts shew that Cocks, Biddulph & Co. are indorsees of the note who have given full value for it, and that they are also holders of the contract of indemnity given by the guarantee corporation—a contract which gives them the additional security of a right of action against that society; they are in no sense holders of a mortgage, charge or lien over the property of the bankrupts. When the conclusion is once reached that Cocks, Biddulph & Co. were the out-and-out holders of the promissory note and of the contract, the case is at an end.

Appeal allowed.

Solicitors for appellants: *Walker, Martineau & Co.*
Solicitors for respondent: *Rooper & Whately.*

W. J. B.

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May 1, 9.

[IN THE COURT OF APPEAL.]

HELBY *v.* MATTHEWS.

Factor—Sale of Goods, Agreement for—Factors Acts—Possession of Goods under Agreement to Purchase—Hire and Purchase Agreement—Disposition of Goods by Person having agreed to Purchase—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *s.* 9.

By the Factors Act, 1889, s. 9, where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods, the delivery or transfer by that person of the goods under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner.

By an agreement made between the plaintiff (thereinafter called the "owner") and B. (thereinafter called the "hirer"), it was witnessed that the "owner" agreed to let a pianoforte on hire to the "hirer," and the "hirer" agreed to pay the "owner" a monthly rent or "hire instalment" of ten shillings and sixpence, on the terms that, if the "hirer" should punctually pay a certain amount by a certain number of such monthly instalments as aforesaid, the instrument should become his property; but, unless and until such full amount was paid, it should remain the property of the "owner." It was provided by such agreement that, if the "hirer" did not duly perform the same, the "owner" might retake possession of the instrument, and that the "hirer" might terminate the hiring by delivering up the instrument to the "owner." Possession of the pianoforte having been given to B. under the agreement, after paying some of the instalments he pledged it with the defendant to secure an advance of money:—

Held (reversing the judgment of a Divisional Court), that by the agreement B. had agreed to buy the piano within the meaning of s. 9 of the Factors Act, 1889.

APPEAL from the judgment of a Divisional Court (Lord Coleridge, C.J., and Day, J.) affirming the judgment of a county court judge.

The facts were as follows. The plaintiff entered into the following agreement with regard to a piano of which he was the owner with one Brewster.

"This agreement, made December 23, 1892, between Charles Helby of &c. (hereinafter called the "owner") of the one part and Charles Brewster of &c. (hereinafter called the "hirer") of

the other part, witnesseth that the owner agrees at the request of the hirer to let on hire to the hirer a pianoforte, No. 896, maker Ross, and in consideration thereof the hirer agrees as follows: (1.) to pay the owner on December 23, 1892, a rent or hire instalment of 10*s.* 6*d.*, and 10*s.* 6*d.* on the 23rd of each succeeding month; (2.) to keep and preserve the said instrument from injury, damage by fire included; (3.) to keep the said instrument in the hirer's own custody at the above-named address, and not to remove the same, or permit or suffer the same to be removed, without the owner's previous consent in writing; (4.) that, if the hirer do not duly perform this agreement, the owner may, without prejudice to his rights under this agreement, terminate the hiring and retake possession of the said instrument, and for that purpose leave and licence is hereby given to the owner, or agent, or servant, or other person employed by the owner, to enter any premises occupied by the hirer, or of which the hirer is tenant, to retake possession of the said instrument without being liable to any suit, action, indictment, or other proceeding by the hirer or any one claiming under the said hirer; (5.) that, if the hiring should be terminated by the hirer under clause A below, and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire up to the date of such return, and shall not on any ground whatever be entitled to any allowance, credit, return, or set-off for payments previously made. The owner agrees, (A) that, the hirer may terminate the hiring by delivering up to the owner the said instrument; (B) that, if the hirer shall punctually pay the full sum of 18*l.* 18*s.* by 10*s.* 6*d.* at the date of signing and by thirty-six monthly instalments of 10*s.* 6*d.* in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer; (C) unless and until the full sum of 18*l.* 18*s.* be paid, the said instrument shall be and continue to be the sole property of the owner. In witness &c."

Possession of the piano was given in pursuance of the agreement to Brewster, who, after paying some of the instalments in respect of the same, pledged it with the defendant, a pawnbroker, to secure an advance, the defendant receiving the piano in good faith and without notice that it did not belong to Brewster,

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or that the plaintiff had any title to or interest in it. Upon default being made in payment of the next instalment due, the plaintiff found out what had happened and demanded the piano from the defendant, who refused to give it up without repayment of the sum advanced. The plaintiff thereupon brought an action against the defendant in the county court for the detention of the piano. The question raised in the county court was whether Brewster was a person who had agreed to buy the piano within the meaning of s. 9 of the Factors Act, 1889, the defendant contending that he was, and the plaintiff that he was not, such a person. (1)

The county court judge gave judgment for the plaintiff; and on appeal his judgment was affirmed by the Divisional Court.

Jelf, Q.C., and *C. L. Attenborough*, for the defendant. The question is whether Brewster was a person who had agreed to buy the piano within the meaning of the 9th section of the Factors Act, 1889. In substance, the agreement in this case is an agreement by Brewster to buy the piano, with an option to terminate the agreement by returning the piano before the agreement is fully performed. There is clearly an agreement to sell by the plaintiff. As soon as Brewster did anything inconsistent with the exercise of the option given to him, as by

(1) By the Factors Act, 1889, s. 2, sub-s. 1: "Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same: provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Sect. 9: "Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title, with the consent of the owner."

putting it out of his power to return the piano, the option was at an end. The agreement is one which will ultimately terminate in a sale unless previously revoked. It must be an agreement for sale by the plaintiff, because the property is to pass from him to Brewster, if the agreement is carried out. There cannot be a sale without a purchaser. This case is not distinguishable from *Lee* v. *Butler* (1), where it was held that the Factors Act applied. [They cited *Bianchi* v. *Nash* (2); The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25.]

Finlay, Q.C., and *Joseph Walton, Q.C.*, *Hextall*, with them for the plaintiff. The only point raised in the county court, and which is open on this appeal, is whether Brewster had agreed to buy the piano within the meaning of s. 9 of the Factors Act, 1889. The question is not raised whether a pledge such as this to a pawnbroker is within the protection given by the Act, as being made in the ordinary course of business within the meaning of s. 2, sub-s. 1. It is submitted that, until the last instalment is paid under this agreement, there is only a contract of hiring. It is a contract of hiring with an option to the hirer, by going on to pay a certain number of instalments, to convert the transaction into a sale. It is not originally an agreement by the hirer to buy the piano; the hirer does not in any way bind himself to go on paying the instalments, and may at any moment determine the contract. In *Lee* v. *Butler* (1) there was clearly an agreement to buy. Here there is not.

[They cited *Hugill* v. *Masker*. (3)]

Jelf, Q.C., in reply.

Cur. adv. vult.

May 9. LORD ESHER, M.R. The defendant's contention was that the case came within s. 9 of the Factors Act, 1889. The Divisional Court held that that was not so. Two questions appear to me to arise in this case: first, what is the true construction of the 9th section; and secondly, what is the true construction of the agreement between the plaintiff and Brewster? The opening words of the 9th section are, "Where a person

(1) [1893] 2 Q. B. 318. (2) 1 M. & W. 545.
(3) 22 Q. B. D. 364.

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having bought or agreed to buy goods," and they do not speak of a person having sold or agreed to sell. The reason of that appears to be that it is the acts of the person who has bought or agreed to buy with which the section is dealing. The section proceeds to enact that, where such a person obtains, with the consent of the seller, possession of the goods, delivery by him of the goods under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller, shall have the same effect as delivery by a mercantile agent in possession of the goods with the consent of the owner—thus extending to cases within the section the provisions of s. 2, sub-s. 1, which provides that, where a mercantile agent is, with the consent of the owner, in possession of goods, any sale, pledge, or other disposition of the goods, made by him acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of the Act, be as valid as if he were expressly authorized by the owner of the goods to make the same. The 9th section has nothing to do with an agreement for the hiring of goods. If this agreement was merely a hiring of the goods to Brewster, the section has nothing to do with it. The section deals with a purchase of goods on the one side, and a sale of them on the other. It seems to me that it must be intended to apply to agreements for the purchase of goods where the property does not pass. If there is such an agreement to buy goods, there must also be a corresponding agreement to sell them; and therefore, though the opening words of the section only mention a person who has agreed to buy goods, it is obvious that it implies that there must in such case be also a person who has agreed to sell the goods. If the goods so agreed to be bought and sold are delivered, with the consent of the person who has agreed to sell them, to the person who has agreed to buy them, then the provisions of the section are applicable. That appears to me to be the meaning of the section.

Then the question arises as to the meaning of this agreement. If it is simply a contract of hiring, the statute does not apply. By its terms it provides for a number of monthly payments, and, if they are all duly made, the piano is to become the sole and

absolute property of Brewster. It seems to me impossible to call such a contract simply a contract of hiring. Then what is it? To determine this question we must look at the whole of the agreement. It has been spoken of as a hire and purchase agreement. That, however, is only a loose popular phrase. In the agreement Brewster is described as the "hirer," and the owner is spoken of as letting the piano on hire; but the agreement is not thereby made one of hire, if according to the substance of the transaction that is not its true effect. The so-called "hirer" agrees to pay a rent or "hire instalment" of 10*s.* 6*d.* on December 23, 1892, and 10*s.* 6*d.* on the 23rd of each succeeding month. If the agreement were merely for the hire of the piano, the term "rent" would have been sufficient. What the meaning of a "*hire* instalment" may be, it is difficult to say. The provision is in truth for payment of monthly instalments. The agreement goes on to provide that, if the hirer does not perform the agreement, the owner may terminate the hiring and take possession of the piano; and also that the hirer may terminate the hiring by delivering up the instrument. Then, if the hirer duly pays the sum of 18*l.* 18*s.* by monthly instalments of 10*s.* 6*d.* for a certain number of months, the piano is to become his sole and absolute property; but unless and until the full sum of 18*l.* 18*s.* is paid, the piano is to remain the property of the owner. Is that agreement a contract by the plaintiff to sell the piano? It cannot, I think, be disputed that it is; but it is said that it is not a contract by Brewster to buy the piano. It is said that he may, whenever he pleases, terminate the agreement by giving up the piano, and, if he does that, there never will be a purchase of it by him. I think that, having regard to the effect of the agreement as a whole, and the fact that by its provisions, if the instalments, for payment of which it provides, are duly paid, the piano is to become the property of Brewster, it is a contract by him to purchase, if he does not terminate the agreement by returning the piano. If the agreement is carried out, it ends in a purchase by him. The proper construction appears to me to be that it is in substance an agreement by one party to sell and by the other party to buy, but with an option to the buyer, to whom the property has not passed, if he changes his mind, of

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putting an end to the contract in a certain manner. How can he put an end to the contract? Only by delivering up the piano. If he sold the piano to an innocent buyer, it is plain that he could not deliver it up. He could not get the piano back from the defendant without paying the sum advanced. Therefore he cannot put an end to the contract. He has shut himself out from so doing. It appears to me that on the true construction of this agreement Brewster was a person who had agreed to buy the piano within the meaning of s. 9. That being so, the result is that this appeal must be allowed, and the defendant is entitled to judgment in the action.

A. L. SMITH, L.J. This is an action of trover brought by the plaintiff to recover possession of a piano from the defendant, a pawnbroker, with whom it had been pledged by a person named Brewster, who had obtained possession of it under what is termed a hire and purchase agreement from the plaintiff; and the question raised is whether Brewster had bought or agreed to buy the piano of the plaintiff within the meaning of s. 9 of the Factors Act, 1889 (52 & 53 Vict. c. 45).

This Act, besides making certain dealings by a mercantile agent, who with the consent of the owner is in possession of goods, or the documents of title to goods, valid as against that owner, has, by s. 9, enacted that, "Where a person" (which means any person) "*having bought or agreed to buy goods*, obtains with the consent of the seller," possession of them or the documents of title relating thereto, he may sell or pledge such goods or the documents of title to a third person, if that person takes in good faith and without notice of any lien or other right of the original seller in respect of the goods.

It will be seen that the power conferred by this section to make a good title against the original seller is confined to persons who have bought or agreed to buy goods of sellers, and it does not include the case of persons who, with the consent of sellers, are in possession of goods or the documents relating thereto, unless they have bought or agreed to buy the goods. It is evident that this section contemplates both a seller, who has sold or agreed to sell, as also a buyer, who has bought or

agreed to buy; for there cannot be a buyer who has "bought or agreed to buy," which are the words of the section, without there also being a seller, who has sold or agreed to sell. It is clear that this section includes the case of a sale when the property in the goods has not passed; for it includes the case of a seller, who has contracted to sell and retains a lien or other right in respect of the goods, as, for instance, the right to retake possession of them upon the happening of given events. Thus, an agreement for sale by a seller subject to a defeasance by him is in my judgment as much within the section as an agreement to sell without a defeasance; so is also an agreement to buy subject to a defeasance as much as an agreement to buy without a defeasance.

This brings me to what has been called the hire and purchase agreement of December 23, 1892, though I should notice that the word "purchase" is not to be found therein.

The real question is whether Brewster, who therein is called the "hirer," in reality agreed to buy the piano in question of the plaintiff within the meaning of the section, for, if he has, then the section, in the circumstances of this case, defeats the plaintiff, for Brewster could confer and has conferred a good title upon the defendant; if, on the contrary, Brewster has not agreed to buy, then the plaintiff is entitled to judgment.

It is quite true that throughout the agreement the plaintiff is termed the "owner" and Brewster is termed the "hirer"; and the agreement is drafted in the form of a letting and hiring of the piano by the plaintiff to Brewster; but, if the transaction be a selling and buying of the piano, the form will not avail so as to defeat the effect of the real transaction.

Now, in the first place, what is the position of the plaintiff under this agreement? Did he only let out the piano on hire to Brewster, or did he bind himself to sell it to him?

I agree with Day, J., that, if in this case there be an agreement for a sale by the plaintiff, it must be at the time when the agreement was executed. Under this agreement the plaintiff delivered the piano to Brewster upon the terms that Brewster should pay the plaintiff for it by thirty-six monthly instalments, and he therein irrevocably bound himself to Brewster that, if he

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(Brewster) performed his part of the agreement—i.e., paid the instalments, and kept the instrument from injury, including damage by fire, and in his own custody—then upon payment of the last instalment the piano should be the sole and absolute property of Brewster. It will be seen that by the agreement the plaintiff has bound himself past recall that upon his being paid the price of the piano by monthly instalments the piano shall become the property of Brewster. What is this but an agreement on the part of the plaintiff to sell? It is true that the plaintiff reserves to himself the right to retake possession if Brewster fails in performing the agreement on his part; but this possible defeasance makes the transaction none the less an agreement by the plaintiff to sell; and here it is that I cannot adopt the view of Day, J., when he says that no contract for sale can be conceivable, there was no seller, and no one bound in the present case to sell, and he holds this because in his opinion, which I will deal with hereafter, no one, as the learned judge says, had agreed to buy, nobody being bound to buy, and no price fixed. In my judgment it must first be determined what it is that the plaintiff has bound himself to do: has he bound himself or not to sell to Brewster? It appears to me that, unless Brewster made default so as to give the plaintiff the right to terminate the agreement, so far as the plaintiff is concerned, the piano was agreed to be sold by the plaintiff to Brewster at the price of 18*l.* 18*s.* to be paid in instalments. So much for the position of the plaintiff under the agreement.

I now come to Brewster's position thereunder. It is strange, if the plaintiff has bound himself to sell the piano to Brewster, which for the reasons above I hold he has, that Brewster on his part has not bound himself to buy the piano of the plaintiff. Mr. Finlay felt the force of this, and admitted that it would be so, had the plaintiff agreed to sell the piano to Brewster; but he said that all the plaintiff had done was in consideration of the payment of the instalments to grant an option of purchase to Brewster. If this be so, I would point out that away goes that part of his case which was that as between the parties it was, until the last instalment was paid, only a hiring agreement. For what is a grant of an option to purchase but an agreement in

præsenti by the plaintiff to sell to Brewster, subject to his right to exercise his option? Had Brewster agreed to pay for the piano in thirty-six instalments without reserving this option, I cannot doubt that Brewster would have agreed to buy the piano from the plaintiff, and this is what was held by this Court in the case of *Lee* v. *Butler*. (1) But, although Brewster reserved this option, he bound himself to pay in any event the first instalment of the price of the piano before he could exercise the option of being allowed to return it to the plaintiff. It is upon the fact that Brewster had reserved this option that the plaintiff rests his case, and asserts that Brewster had not agreed to buy the piano of him, but had only agreed to hire the piano with the right of exercising the option to purchase it, if he so desired. It will be seen that the only way that Brewster could avoid becoming possessed of the piano, if the plaintiff did not exercise his right to retake possession, if circumstances arose which entitled him to do so, was by delivering it to the plaintiff within the period of the thirty-six months. Suppose the piano was burnt, say during the first month, whilst in Brewster's possession, so that he never could deliver it up to the plaintiff, what would be the result? Brewster would be liable to pay the instalments during the residue of the thirty-six months, and the loss of the piano so burnt would fall upon Brewster, for he would have paid the whole of the contract price, and not had the instrument. This result follows because Brewster had in reality agreed to purchase the piano for better or worse, subject to this, that during the term, if he could do so, he might send back the piano to the plaintiff.

In my judgment the true view of this agreement is that, as on the one hand the plaintiff agreed to sell the piano to Brewster subject to a defeasance to be exercised by the plaintiff, so on the other Brewster agreed to buy the piano of the plaintiff subject to a defeasance to be exercised by Brewster. For these reasons in my judgment Brewster did agree to buy the piano of the plaintiff within the meaning of s. 9 of the Act of 1889, and consequently judgment should be entered here and below for the defendant and this appeal allowed.

(1) [1893] 2 Q. B. 318.

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DAVEY, L.J. Sect. 9 of the Factors Act, 1889, contemplates a purchase or agreement to buy goods where the purchaser has possession of the goods, but the property has not passed to him. It was decided in *Lee* v. *Butler* (1), that what is called a hire and purchase agreement was within the scope of this section, i.e., an agreement where the hirer has possession of the goods and agrees to pay a sum certain by fixed instalments accompanied by an agreement that, upon payment of all the instalments, the goods are to become the property of the hirer, but subject to a proviso that on default in payment of any instalment the owner of the goods may resume possession. In this case there is the further term, that the hirer may put an end to the contract by returning the goods. Does this distinguish the case from *Lee* v. *Butler* (1), and take it out of the 9th section of the Act? I think not. There is an agreement by the owner of the goods that on payment of thirty-six monthly instalments the goods shall become the property of the hirer—in other words, an agreement to sell. But a seller connotes a buyer, and an agreement to sell connotes an agreement to buy. The hirer agrees to pay the instalments monthly, not during any expressed period; but I think it may be inferred from the context that the total sum to be paid is the amount of thirty-six monthly instalments, and that is made a sum certain by the terms of the contract; and, further, that the hirer's agreement to pay is also sufficiently defined to be until thirty-six instalments are paid. So long as the hirer retains possession and the contract remains undetermined, the hirer is under contract to pay the instalments, and may be sued for them as they become due, on the terms that upon payment of the last instalment the goods will become his property. But he has a power to determine and defeat his contract by returning the goods. Until he does so, he is under contract to buy, and at the time of the pledge to the pawnbroker he remained under that contract, and was in my opinion a person who had agreed to buy goods within the meaning of s. 9, and the decision in *Lee* v. *Butler* (1), and none the less so because he had a power, which he had not exercised, and in fact by pledging the goods had for the time put it out of his power to exercise, of defeating the con-

(1) [1893] 2 Q. B. 318.

tract. I agree with Day, J., that you must find the agreement for sale at the time when possession of the goods is handed to the buyer; but in my opinion it is only by virtue of the written contract that the hirer will on payment of the instalments become the owner of the piano. For the reasons above given, I cannot agree with the learned judge that at that time there is no purchase, or that nobody has agreed to buy, or that there is no price fixed.

Appeal allowed.

Solicitor for plaintiff: *H. E. Tudor.*
Solicitor for defendant: *John Attenborough.*

E. L.

DAYKIN, APPELLANT; PARKER AND OTHERS, RESPONDENTS.

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April 17.

Licensing Acts—Licence—Renewal—Proceedings where no Notice of Opposition—Objection made in open Court—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act,* 1874 (37 & 38 *Vict. c.* 49), *s.* 26.

An objection to the renewal of a licence made in open court at the general annual licensing meeting is a good "objection made" within the meaning of the proviso to s. 42 of the Licensing Act, 1872, although neither the grounds nor the nature of the objection are stated by the objector, and upon such an objection being made the licensing justices have power to postpone the consideration of the application to an adjourned meeting.

CASE stated by the chairman of the Warwickshire Quarter Sessions upon an appeal against a refusal by the licensing justices of Birmingham to grant a renewal of an alehouse licence to the appellant Daykin. The following were the material facts:—

Prior to the general annual licensing meeting on August 24, 1893, no notice of intention to oppose the renewal of the licence had been served on the applicant. At that meeting the chief constable in open court said, "I object to the renewal of the licence to the King's Head" (the applicant's house); and thereupon the justices adjourned the consideration of the renewal to the adjourned meeting on September 21. The clerk, on behalf of the justices, gave the appellant a notice which, after stating the day and hour of the adjourned meeting, proceeded as follows: "You are hereby required by the licensing justices to attend the said meeting personally, to make your application for the renewal

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of your licence, an objection to such renewal having been made in open court at the general annual licensing meeting, held on August 24 instant, by Joseph Farndale, chief constable of the said city." The chief constable also gave the appellant a notice in writing of the grounds of his objection, which were (1.) that the licence was not necessary, and was not required to supply the wants of the neighbourhood, and (2.) that the house had been kept in a disorderly manner, and a previous licensee had been convicted of an offence against the Licensing Acts.

On September 21, the appellant appeared with his counsel at the adjourned meeting and made his application for the renewal of the licence, when the grounds of objection contained in the chief constable's notice were inquired into upon oath, and no objection was made by or on behalf of the appellant to the jurisdiction of the justices or to any omission or irregularity in the procedure at the general annual licensing meeting; at the conclusion of the case the justices refused to grant the renewal. Notice of appeal to the quarter sessions was duly given on the ground (inter alia) that the refusal was illegal and contrary to law.

At the hearing of the appeal, upon the close of the respondent's case upon the facts, counsel for the appellant contended that at the general annual licensing meeting no sufficient objection had been made to the renewal of the licence as required by the provisions of the Licensing Acts, and that the chief constable in giving the oral notice at the general annual licensing meeting ought at the same time to have stated the general grounds of his objection or, at least, what the nature of his objection was. For the respondents it was contended, that if there had been any omission it had been waived by what took place at the adjourned meeting, and also that the statement made by the chief constable was sufficient to justify the justices in adjourning the application, and in dealing at the adjourned meeting with the objections to the renewal.

The quarter sessions were of opinion, after referring to the case of *Reg.* v. *Justices of Merthyr Tydvil* (1), that no valid notice of objection had been given on August 24, within the meaning of the Licensing Act, 1872, s. 42, and the Licensing Act, 1874,

(1) 14 Q. B. D. 584.

s. 26 (1), and consequently that all the subsequent proceedings were void; they accordingly considered themselves bound to renew, and did renew, the licence and allowed the appeal.

If the Court was of opinion that the decision of quarter sessions was wrong, and that an objection was sufficiently made at the general annual licensing meeting, or if insufficiently made that the objection to such insufficiency was waived, the decision was to be reversed and the appeal dismissed.

An order nisi was subsequently obtained upon behalf of the respondents, the justices, calling upon the appellant to shew cause why the order of quarter sessions should not be quashed.

Poland, Q.C. (*W. Russell Griffiths*, with him), for the respondents. (2) The decision of quarter sessions was wrong. The objection of the chief constable in open court was sufficient to warrant the licensing justices in adjourning the application; it would have been useless then to state the grounds of his objection

(1) By 35 & 36 Vict. c. 94, s. 42: "Where a licensed person applies for the renewal of his licence the following provisions shall have effect:

"(1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend:

"(2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given."

By 37 & 38 Vict. c. 49, s. 26: "Whereas by s. 42 of the principal Act it is enacted that a licensed person applying for the renewal of his licence need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend: Be it enacted, that such requisition shall not be made, save for some special cause personal to the licensed person to whom such requisition is sent.

* * * *

"A notice of an intention to oppose the renewal of a licence served under s. 42 of the principal Act shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed."

(2) The terms "appellant" and "respondent" are used in this report with reference to the positions of the parties in the appeal to quarter sessions, and not in the Divisional Court.

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in the absence of the licence-holder, whose presence was by statute made unnecessary. The proviso in s. 42, sub-s. 2, of the Act of 1872 is not cut down by s. 26 of the Act of 1874, which does not limit the then existing power of the justices, upon an objection being made, to adjourn the consideration of the renewal to a future day. The sole condition is that an objection must be made, and the only point decided in *Reg.* v. *Justices of Merthyr Tydvil* (1), is that the objection must be made in open Court and not privately; this is expressly stated by Mathew, J., in *Reg.* v. *Howard.* (2) Assuming that the chief constable should have stated generally the grounds of his objection at the time he made it, it was a mere irregularity, and any objection on that ground was waived by the conduct of the appellant: *Whiffen* v. *Justices of Malling* (3); *Fry* v. *Moore.* (4)

[He also cited *Reg.* v. *Justices of Redditch* (5); *Reg.* v. *Farquhar.* (6)]

Alfred Young, for the appellant. The decision of quarter sessions was right; the licensing justices had no jurisdiction to refuse the renewal. The proviso to s. 42 says that on the day of adjourned meeting *the* objection will be considered as if *the* notice thereinbefore described had been given. When s. 26 of the later Act is considered, it is obvious that the licensing justices must at the annual licensing meeting have something more than a bare objection to the renewal of the licence before them; they must know the nature of the objection, for they are to be the judges of whether there is any cause personal to the applicant which justifies them in summoning him before them. It is true that the written notice of intention to oppose a renewal prescribed by s. 42 need not contain the grounds of opposition, but it is different with the making of an objection, for that involves stating what the nature of the objection is. The notice of the chief constable is mere waste paper, for he cannot bring the applicant before the Court unless required by the justices to do so. As regards the question of waiver, *Whiffen* v. *Justices of Malling* (3) is not an authority for the respondents; in that case

(1) 14 Q. B. D. 584.
(2) 23 Q. B. D. 502.
(3) [1892] 1 Q. B. 362.
(4) 23 Q. B. D. 395.
(5) 50 J. P. 246.
(6) Law Rep. 9 Q. B. 258.

there was a mere informality not affecting the question of jurisdiction; here the so-called informality goes to the very root of the jurisdiction of the justices to bring the applicant before them at all.

CHARLES, J. I am of opinion that this rule should be made absolute. The objection is to a decision of the quarter sessions of Warwickshire on the ground that they were wrong in holding that the proceedings before justices on an application for the renewal of a licence were void, and that no valid objection had been made at petty sessions to such renewal. The only question that arises for us is whether or not in the circumstances which occurred the licensing justices had jurisdiction to refuse the renewal. The Court of Quarter Sessions held that they had none; that no valid objection had been made, and they therefore felt themselves bound to renew. The question depends on the proper construction of s. 42 of the Licensing Act, 1872. [The learned judge read the section.] In the present case no written notice had been given of an intention to oppose the renewal, but on the day of the general annual licensing meeting an objection to the renewal was orally made by the chief constable in open court; and thereupon the justices, by notice under the hand of their clerk, required the licence-holder to attend at the adjourned meeting, and on the same day the chief constable gave him a notice specifying the grounds of his objection. The point is taken that, although the objection was in fact made, there was no jurisdiction to adjourn, because it did not then appear on what ground the objection was made. It is said that, on reference to s. 26 of the Licensing Act, 1874, it appears that in order to found jurisdiction it is essential that the notice given in open court should state the grounds of the objection. It would be surprising if this were true, for a more futile objection it is impossible to conceive, seeing that it cannot possibly affect the licence-holder, who ex hypothesi is not present; it is necessary, however, to consider that section, previously, however, considering the language of s. 42 of the Act of 1872.

It is perfectly clear under s. 42 that when a written notice has been served, sufficient has been done to found jurisdiction; it is

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not necessary to tell the licence-holder the grounds of the objection; if that is so, I fail to see why the proviso should make it necessary that an objection taken in open court should disclose the grounds; and, in my opinion, in neither case does the section require this to be done. In the Act of 1874, after reciting sub-s. 1 of s. 42 of the earlier Act, it is provided that the objection to renewal is not to be made except for reasons personal to the licence-holder, and, further, that notice of the intention to oppose must be given. It is argued on behalf of the licence-holder that because the licensing justices can no longer require the licence-holder to appear before them except for special reasons, it involves the consequence that the requisition to attend the adjourned sessions on an objection made in open court can be only given upon an objection being made on grounds personal to the licence-holder, and the objection must therefore state the grounds on which it is made, to the same extent that the written notice of intention to oppose must by s. 26 of the later Act state them. In my opinion that would be to apply to the proviso a part of s. 26 which is wholly inapplicable to it. What was intended by the legislature was this: the licence-holder was to be relieved from the necessity of attending the general annual licensing meeting unless he was required to attend, and s. 26 of the Act of 1874 says that the justices shall not require his attendance except for some reason personal to himself; it goes no further than that, and leaves untouched the rest of s. 42 of the Act of 1872. It is true that the justices cannot bring the man before them except for certain special reasons personal to himself; but when the licensing sessions are held it is clear that an objection may be made which could not have been made before, such as an objection on the ground of something that has taken place within seven days prior to the meeting; the legislature, therefore, has not by s. 26 cut down the power given to justices under the proviso in s. 42 of the Act of 1872. It is said, how can the justices find out whether it is a case in which they can properly require the attendance of the licence-holder unless they know the nature of the objections made to the renewal of his licence? but the answer to that is that the section only requires the objection to be made, and the propriety of requiring

his attendance is left to the discretion of the justices, who are not to be supposed to have adjourned the sessions in an improper case.

I think, therefore, that, in considering whether there is jurisdiction, we must examine the terms of s. 42 of the Act of 1872, and that the appellant cannot avail himself of the privilege conferred by s. 26 of the Act of 1874. It might be said that, if that be so, the chief constable's notice was superfluous; the point was not however argued, as the respondent's counsel thought that some notice ought to be given of the intention to oppose the renewal; he would apply to the case of a licence-holder summoned to an adjourned meeting the last portion of s. 26 of the Act of 1874. That seems a reasonable position to take: that where the jurisdiction has once been founded by an objection taken in open court, the notice of intention to oppose shall not be valid unless it state in general terms the grounds of objection. I am inclined to think that the chief constable's notice was necessarily given; and if so, it complies with s. 26 of the Act of 1874, for it does state in general terms the nature of the objection. The objection to the jurisdiction therefore falls to the ground.

If this is not a question of jurisdiction, but such a case as that of *Whiffen* v. *Justices of Malling* (1), that is, a question of informality in the form of the objection, it is plain that there has been ample conduct on the part of the licence-holder to amount to a waiver of the informality. If the objection goes to jurisdiction, and if we think there was no jurisdiction, the subsequent conduct of the licence-holder cannot confer it; if, however, there was any jurisdiction, his conduct was a waiver of the informality. It is unnecessary to go through the cases cited in argument; but I may point out that the case of *Reg.* v. *Justices of Merthyr Tydvil* (2) simply decides that an objection made in the justices' private room is no objection within s. 42 of the Act of 1872; it decided nothing else, as is expressly pointed out by Mathew, J., in *Reg.* v. *Howard.* (3) I am clearly of opinion, therefore, that the decision of quarter sessions was wrong.

(1) [1892] 1 Q. B. 362. (2) 14 Q. B. D. 584.
(3) 23 Q. B. D. 502.

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BRUCE, J. I am of the same opinion. The objection to the renewal of the licence was raised for the first time at the general annual licensing meeting, and the application was postponed to the adjourned meeting, the clerk to the justices giving the applicant notice to attend, and a notice stating the grounds of objection being also served upon him. It is said that the justices had no jurisdiction to refuse the renewal, the grounds of objection not having been stated at the general annual licensing meeting. The statute, however, gives jurisdiction to the justices upon an objection being made, and nothing is said in s. 42 as to the grounds of objection. It is true that s. 26 says that the notice of an intention to oppose the renewal of a licence under s. 42 is not to be valid unless it states in general terms the grounds of opposition to the renewal; but in the present case no such notice as is contemplated by s. 42—that is, a notice seven days before the general annual licensing meeting—was given at all, and this provision of s. 26 has therefore no application to the present case. In my judgment the proviso of s. 42 of the Act of 1872 only applies where no written notice of an intention to oppose a renewal has been given, and we must not read into it, as we are asked to do, words which are not to be found in it. It is clear, too, that it would be useless to give the grounds of objection when making an oral objection in open Court, for the licence-holder, being absent, could get no advantage from it. The licensing justices have a discretion as to whether they shall adjourn an application or not, and may make inquiries about the case, if they think fit, in order to guide them in the exercise of their discretion; but that is a very different thing from saying that it is necessary that the grounds should be stated in an objection before their jurisdiction arises.

Order absolute to quash order of quarter sessions.

Solicitors for appellant: *Steadman, Van Praagh, Sims & Co.*

Solicitors for respondents: *Sharpe, Parker, Pritchards, & Barham, for C. A. Carter, Birmingham.*

W. J. B.

PONTING *v.* NOAKES AND OTHERS.

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April 11, 26.

Nuisance—Poisonous Trees—Injury to Cattle—Yew Tree near Boundary of Field—Whether Duty on Occupier of Land to prevent access of Neighbour's Cattle to Poisonous Tree.

The plaintiff and the defendants occupied adjoining fields separated by a fence and ditch belonging to the defendants. The ditch was on the side of the fence next the plaintiff's field, his boundary being the edge of the ditch. On the defendants' side of the fence grew a yew tree, the branches of which extended over the fence and partly over the ditch, but no part of the tree extended over or up to the plaintiff's boundary. The defendants were under no liability to fence against their neighbour's cattle. The plaintiff's horse ate of the branches extending over the ditch, and died therefrom. In an action to recover as damages the value of the horse :—

Held, that the defendants were not liable, because there was no duty on them to take means to prevent the plaintiff's horses from having access to the branches of the tree.

APPEAL against the verdict and judgment for the plaintiff in an action, tried before the deputy judge of the Andover County Court and a jury, to recover as damages the value of the plaintiff's horse, which was alleged to have died through eating of the defendants' yew tree.

The following statement of the facts proved or admitted at the trial is taken from the judgment of Charles, J. (1)

The plaintiff was a farmer, and occupied a field separated from the premises of the defendants by a fence. On the side of the fence next the plaintiff's field was a ditch belonging to the defendants. On the defendants' land near the fence grew a yew tree, the branches of which projected over the ditch, but not beyond it. They did not overhang the plaintiff's field. At the distance of about 120 yards grew another yew tree in the garden of one Hunt, which overhung the plaintiff's field, and in the hedge of the plaintiff's field, about fifty yards from the defendants' yew tree, there was a small yew bush. On June 25, 1893, the colt and several other horses were in the plaintiff's field. On the 26th the colt was found dead five yards from the defendants' yew, and there was no doubt from the examination made of the body that it had died from eating yew leaves. All

(1) Post, p. 284.

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the three trees, the defendants', Hunt's, and the plaintiff's yew bush, presented appearances of having been recently eaten. A veterinary surgeon stated that it was a fact within his knowledge that horses have been known to walk a mile after eating yew leaves before dying, and then to drop down dead. Such a case, however, would be, he said, exceptional: the animal most often drops down dead directly after the eating, or after walking a short distance.

On the above evidence the deputy judge left the case to the jury, who gave a verdict for the plaintiff for the damages claimed, and judgment for the plaintiff was given accordingly.

The defendants appealed.

Horace Browne, for the defendants. There was no evidence which ought to have been left to the jury that the plaintiff's horse died from eating of the defendants' yew tree. On the facts it was equally consistent that he died from eating of Hunt's tree or the plaintiff's yew bush. The jury were not entitled to guess which of the trees caused the death. Further, the facts shew that the horse must have trespassed on the defendants' land if he ate of their tree. No duty on their part to fence against their neighbour's cattle was shewn, nor was there any duty to protect such cattle from having access to the tree. The deputy judge, therefore, ought to have given judgment for the defendants.

T. W. Chitty, (*Frank Newbolt*, with him), for the plaintiff. The veterinary surgeon's evidence established a very strong probability that the horse died from eating of the defendants' tree, and the case was properly left to the jury.

On the other point, the doctrine of *Fletcher* v. *Rylands* (1) applies: see Lord Cranworth's judgment. (2) In *Crowhurst* v. *Amersham Burial Board* (3) that doctrine was applied to the case of a yew tree growing upon the defendants' own land. Further, the defendants are liable on the ground that, in growing the yew tree, which they knew to be poisonous, near to the plaintiff's

(1) Law Rep. 1 Ex. 265; 3 H. L. 330.

(2) Law Rep. 3 H. L. at pp. 340, 341.

(3) 4 Ex. D. 5.

land, they must have contemplated that their neighbour's cattle would come up to the ditch and eat of the tree. It makes no difference that the horse's head must have been over the ditch at the time he ate. If the natural consequence of putting a dangerous thing in a particular position is that animals will be attracted to and injured by it, then the person putting the thing up is liable if he does not use reasonable care to prevent animals getting access to it. The case comes within the principle of *Bird* v. *Holbrook* (1); *Townsend* v. *Wathen* (2); *Lynch* v. *Nurdin.* (3)

Horace Browne, in reply. It is clear that the plaintiff was bound to keep his cattle within his own boundary: *Boyle* v. *Tamlyn.* (4) There was no conduct on the defendants' part equivalent to a trap or invitation. In *Crowhurst* v. *Amersham Burial Board* (5) the point taken for the plaintiff here might have been, but was not, taken. In *Wilson* v. *Newberry* (6) it was held that there was no duty on the defendant to prevent the clippings of a yew tree, which he knew to be poisonous, being placed on land not occupied by him.

[He also referred to *Degg* v. *Midland Ry. Co.* (7), *Lee* v. *Riley* (8), and *Cotton* v. *Wood.* (9)]

Cur. adv. vult.

1894. April 26. The following written judgments were delivered:—

CHARLES, J. This was an appeal from a verdict and judgment for the plaintiff given in the county court at Andover for £22, being the value of a colt of the plaintiff which was alleged to have been poisoned by eating of the defendants' yew tree. The grounds of the appeal were, first, that there was no evidence to go to the jury that the colt had, in fact, eaten of the yew tree of the defendants; and, secondly, that if there was, the colt had eaten the yew leaves under circumstances which entailed no legal

(1) 4 Bing. 628.
(2) 9 East, 277.
(3) 1 Q. B. 29.
(4) 6 B. & C. 329; 9 D. & R. 430.
(5) 4 Ex. D. 5.
(6) Law Rep. 7 Q. B. 31.
(7) 1 H. & N. 773; 26 L. J. (Ex.) 171.
(8) 18 C. B. (N.S.) 722; 34 L. J. (C.P.) 212.
(9) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333.

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liability on the defendants. The facts of the case were as follows. [The learned judge stated the facts as previously set out.]

Upon this evidence the judge was asked to direct a verdict for the defendants on the ground that there was no evidence pointing to the colt having eaten of the defendants' yew. It was equally consistent, it was said, with the colt having eaten either of Hunt's yew tree or the plaintiff's yew bush. The judge, however, thought there was a case for the jury, and they found that the colt had eaten of the defendants' tree and not of the other trees. I have, after some hesitation, come to the conclusion that there was some evidence to support this finding, having regard in particular to the evidence of the veterinary surgeon. The defendants' yew had been freshly eaten, and the most common case is that death ensues directly. The colt was found only five yards from the tree, and the two other possible causes of mischief were respectively 120 and fifty yards off. This being the view I take of the evidence, it becomes necessary to consider the second point. The poisonous tree was admitted to be wholly on the defendants' land; but, inasmuch as it was so near to the boundary that an animal could easily reach the branches, it was contended that the principle of *Fletcher* v. *Rylands* (1) was applicable. But this argument appears to me to rest on a misconception of what that case really decided. The decision only refers to the escape from a defendant's land of something which he has brought there, and which is likely to do mischief if it escapes. In delivering the judgment of the Exchequer Chamber, Blackburn, J., laid down the true rule of law, in words expressly approved and adopted in the House of Lords, as follows: "The person who for his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril; and, if he does not do so, is primâ facie answerable for all the damage which is the natural consequence of its escape." Various illustrations are then given, in all of which the cause of offence was not "kept in" by the defendant. Thus, the person whose grass is eaten by the escaping cattle of his neighbour, whose mine is flooded by water from his neighbour's reservoir, whose cellar is invaded by filth from his

(1) Law Rep. 1 Ex. 265; 3 H. L. 330.

neighbour's privy, or whose habitation is made unhealthy by vapours from his neighbour's factory, has in each case legitimate ground of complaint. To use the language of the Court in *Tenant* v. *Goldwin* (1), "He whose dirt it is must keep it in that it may not trespass," and many other cases might be referred to illustrative of the rule. In all of them, however, it will be found that the noxious thing—be it beasts, water, filth, or smells, or what not—has somehow escaped from the defendant's land. Thus, in *Firth* v. *Bowling Iron Co.* (2), the defendants' predecessors had fenced their land with wire rope, which the defendants allowed to remain. From long exposure the strands of the wires composing the rope became decayed and pieces of it fell on the plaintiff's adjoining pasture. One of his cows swallowed a piece and died in consequence. The defendants were held liable to compensate the plaintiff. So, again, where the defendants planted on their own land a yew tree which projected over the plaintiff's land, and the plaintiff's horse ate of it and died, the defendants were held liable: *Crowhurst* v. *Amersham Burial Board.* (3) On the other hand, in a case where the declaration merely charged that "the defendant was possessed of yew trees the clippings of which he knew to be poisonous," it was held that such an allegation of fact did not support a duty to take care to prevent the clippings from being put upon his neighbour's land, where horses and cattle might eat them: *Wilson* v. *Newberry.* (4) The rule of law enunciated in *Fletcher* v. *Rylands* (5) I think, therefore, has no application, and I proceed to consider whether upon any other ground the defendants' liability can be made out. Can it be said that there is any duty on a man either not to grow a poisonous tree so near the boundary of his property as to be easily accessible to the stock of his neighbour, or, if he does so, to take precautions to prevent any danger to the stock arising? Now, here it must be remembered that no liability on the part of the defendants to fence against the cattle of their neighbour was proved. Had any such liability been shewn to exist, and had the fence been defective, it might well have been

(1) 1 Salk. 360.
(2) 3 C. P. D. 254.
(3) 4 Ex. D. 5.
(4) Law Rep. 7 Q. B. 31.
(5) Law Rep. 1 Ex. 265; 3 H. L. 330.

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found by the jury that the colt had obtained access to the defendants' land through breach of his obligation to fence, and, the poisonous tree being immediately within the fence, that the eating of its leaves by the colt was the natural consequence of the defendants' breach of duty. But, there being no liability on the part of the defendants to repair the fence, I do not see that they can be made responsible for the eating of these yew leaves by an animal which, in order to reach them, had come upon their land. The hurt which the animal received was due to its wrongful intrusion. It had no right to be there, and its owner, therefore, had no right to complain. The true test in such a case is pointed out by Gibbs, C.J., in *Deane* v. *Clayton* (1), in a judgment which was emphatically approved by the Court of Exchequer in *Jordin* v. *Crump* (2), though on the facts proved in *Deane* v. *Clayton* (1) the Court were equally divided as to what judgment should be entered. We must ask, he says, "in each case whether the man or animal which suffered had, or had not, a right to be where he was when he received the hurt." If he had not, then (unless, indeed, the element of intention to injure, as in *Bird* v. *Holbrook* (3), or of nuisance, as in *Barnes* v. *Ward* (4), is present) no action is maintainable. It was, however, urged that there was here something in the nature of nuisance, and that the growing of this yew tree so near the boundary was actionable, in case damage was caused by it, on the same ground as that on which *Townsend* v. *Wathen* (5) was decided. It was there held that if a man places traps baited with flesh on his own ground so near to the premises of another that dogs kept on his neighbour's premises must probably be attracted by their instinct into the traps, and if in consequence his neighbour's dogs are so attracted and are injured, an action lies. But no evidence whatever was offered in this case that the yew tree could be regarded as a trap in this sense to the plaintiff's horses, and in the absence of any such evidence it was, I think, the plaintiff's business to keep his horses from going too near the tree, and not the defendants' duty to take any precautions

(1) 7 Taunt. 489, at p. 533.
(2) 8 M. & W. 782.
(3) 4 Bing. 628.
(4) 9 C. B. 392.
(5) 9 East, 277.

against their doing so. In the result, therefore, I think that this appeal must be allowed, and judgment entered for the defendant.

COLLINS, J. I should not have thought it necessary to add anything to the judgment of my brother Charles were it not that we are differing from the deputy county court judge, and that I have written my judgment. Under those circumstances, I think it better to deliver it. The facts are as follows:—[The learned judge stated them.] On these facts Mr. Browne, for the defendants, submitted that there was no evidence to go to the jury that the horse died from the effects of eating the defendants' yew tree; that it was equally consistent with the facts that the horse died through eating of either or both the other trees, and that to leave the case to the jury was to invite them to decide the question by a guess. He further contended that, even assuming that the horse had died through eating of the defendants' yew tree, the facts disclosed no legal wrong done to the plaintiff, the tree in question being wholly on the defendants' own land and incapable of being reached by the horse unless it got its head at least beyond the plaintiff's boundary, and thereby committed a trespass. The learned judge held against him on both points, and directed the jury that it was immaterial whether the yew tree could not be reached without a trespass or not. On the first point I have very grave doubt whether there was any evidence fit to be submitted to a jury; but, as I have arrived at a clear opinion in favour of the defendants on the second and more important point, it is unnecessary to deal with the first. The yew tree in question was wholly within the defendants' boundary. Therefore, it seems clear that the principle of which *Fletcher* v. *Rylands* (1) is an instance has no application to this case. The principle there stated was that "the person who for his own purposes brings on his land, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril." That case, as is pointed out by Mellor, J., in *Wilson* v. *Newberry* (2), was decided on the analogy of *Tenant* v. *Goldwin* (3),

(1) Law Rep. 1 Ex. 265; 3 H. L. 330.

(2) Law Rep. 7 Q. B. 31.

(3) 1 Salk. 360.

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where it was said: "He whose dirt it is must keep it that it may not trespass." Here there has been no escape or trespass of anything kept by the defendants, and, if they are liable at all, it must be for not taking precautions to prevent the plaintiff's cattle from getting access to the defendants' yew tree on the defendants' own premises—in other words, for negligence. I should add that there was no evidence of any obligation on either party to maintain the fence for the benefit of the other, and the case may be treated, therefore, as if there had in fact been no fence. What, then, was the duty cast upon the defendants, the breach of which grounds this action? Mr. Chitty, who argued for the plaintiff, contended that the owner of anything capable of attracting cattle, and dangerous to them if they yielded to the attraction, was bound to use reasonable care to prevent them getting access to it. Does such a duty exist? I think not; and Mr. Chitty was not able to produce any authority which went near to establish it. The point might have arisen in *Crowhurst* v. *Amersham Burial Board.* (1) There a horse had died from eating of a yew tree growing on defendants' land, and the case, as originally stated by the county court judge, left it doubtful whether the death was caused by eating portions of the tree which projected over the plaintiff's land, or portions on the defendants' own land, which the horse was able to reach by stretching his neck over the intervening fence. The Court, however, sent the case back to be restated; and it was then found as a fact that the horse died exclusively from the effects of eating portions which projected over the plaintiff's land, and the case was accordingly decided in favour of the plaintiff on the authority of *Fletcher* v. *Rylands.* (2) The Court, therefore, evidently thought that different considerations might apply to the two sets of facts. Again, in *Firth* v. *Bowling Iron Co.* (3), it was not suggested that liability could be established if the cattle had died from eating wire which had fallen on the defendants' side of the fence, and this case was also brought under *Fletcher* v. *Rylands.* (2) What, then, are the duties towards strangers of a man who keeps a dangerous thing on his own ground? There

(1) 4 Ex. D. 5. (2) Law Rep. 1 Ex. 265; 3 H. L. 330. (3) 3 C. P. D. 254.

was not much evidence on the point; but it was assumed in argument, and I treat it as established, that a yew tree is a dangerous thing, i.e., it may be injurious if eaten by horses. It is, however, lawful and usual, as pointed out by Kelly, C.B., in *Crowhurst* v. *Amersham Burial Board* (1), to plant yew trees near fences. Though possibly dangerous, therefore, under some circumstances, there is nothing unlawful in a yew tree so planted. Further, the danger, such as it is, is obvious; it does not constitute a trap. Is the person who keeps such a thing upon his own land liable to a stranger for loss happening to the cattle of the latter while straying on such person's land without his permission? It seems quite clear on the authorities that he is not. *Jordin* v. *Crump* (2) is decisive on this point. There the facts admitted on demurrer were that, while the plaintiff was walking on a public footpath running across the defendant's close, his dog, in chasing a rabbit on the defendant's land, ran against a dog-spear, concealed in the bushes not far from the path, and was killed. The plaintiff had notice of the existence of dog-spears on the defendants' ground. Alderson, B., in giving the judgment of the Court in favour of the defendant, adopted the reasoning of Gibbs, C.J., in the earlier case of *Deane* v. *Clayton*. (3) He says (at p. 788): "The present case is much stronger than that, for here the plaintiff had express notice that dog-spears were set in the wood; though, were this even otherwise, our decision would still be in favour of the defendant, on the short ground that the setting of them was a lawful act, and the accident occasioned by them was the act of the dog, not of the defendant, and that the plaintiff was bound to keep his dog on the footpath." Unless the fact that the yew tree was close to the fence makes a difference, this authority seems conclusive that the defendants are not liable if the yew tree be regarded merely as a dangerous thing, like a dog-spear, not having in itself the additional element of tempting a trespasser. It seems quite clear, however, that the principle cannot be affected by the distance from the defendants' boundary. It was the duty of the plaintiff to keep his horse from trespassing, and not of the defendants to guard against the consequences of

(1) 4 Ex. D. 5.
(2) 8 M. & W. 782.
(3) 7 Taunt. 489.

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such trespass. Such duty is clear, and the plaintiff might have been liable to the defendants for damage done by his horse whilst so trespassing on the land of the latter: *Cox* v. *Burbidge* (1); *Ellis* v. *Loftus Iron Co.* (2) Does it, then, make any difference that a yew tree is likely to tempt a horse to trespass. I think not, unless it were proved that it was put or kept there for the purpose of enticing the animal to its destruction, as was done in *Townsend* v. *Wathen* (3), cited by Mr. Chitty. The wrongful intention was the gist of that action. If such intention is disproved, it follows, if the above reasoning be correct, that there can be no liability. Indeed, the very point is put as an illustration by Gibbs, C.J., in *Deane* v. *Clayton* (4), where he takes the case of water, in which a plaintiff has no right, polluted by the act of the defendant and drank by the plaintiff's cattle, who reach it through a trespass on the defendant's land. He says: "The right to be there is the gist of the action, and in no instance has an action been supported where cattle had no right to be in the place in which they received the damage, unless the defendant had used some undue means to entice them, as in *Townsend* v. *Wathen* (3), which stands on a distinct ground." It is obvious that water might have just as great an attraction as a yew tree. The result may be summarized by saying that the action is one of negligence, and the possession of something attractive and injurious to cattle casts no duty on the owner to take precautions against their trespassing in pursuit of it, where he has not placed or kept it there with that purpose. As already pointed out, a yew tree near a fence is a lawful and usual thing, and it would be strange if the owner should find himself fixed with varying obligations in respect thereof, according to the varying uses to which the adjoining owner chose to put his land. Lastly, it was suggested that the analogy of such a case as *Lynch* v. *Nurdin* (5) might apply, and that, as in that case a defendant who had left his cart and horse in a highway where he had a right for the time being to place them was held liable for injury to a child who trespassed upon it in his absence, so here the defendants

(1) 13 C. B. (N.S.) 430.
(2) Law Rep. 10 C. P. 10.
(3) 9 East, 277.
(4) 7 Taunt. 489, at p. 531.
(5) 1 Q. B. 29.

might be liable for not taking precautions to prevent the horse getting access to the tree. The cases, however, differ in a crucial point. There the cart was left in a public highway, where the children and the plaintiff had an equal right to be, and the children were not trespassers before they got into the cart. If the plaintiff had licensed the defendants to carry their yew tree across the plaintiff's field, and the defendants while doing so had left it unguarded, and while so left the horse had eaten it, the case would be more nearly parallel. So of the case put during the argument of a poisonous drug exposed in a very tempting shape in an open shop front beside a highway within reach of a child, who, being tempted, ate it and was injured. If an action could be maintained in such a case it would, I think, be only on the analogy of those cases which decide that the person who makes or keep a pitfall so near the highway as to be a danger to persons passing along it is responsible in damage to a passenger along the highway who accidentally falls into it (see *Barnes* v. *Ward* (1)), the child obeying its instinct being regarded as in the same position as a person who without negligence falls off the highway into the pitfall. Those cases rest on the special duty incident to the occupation of property adjoining a highway, and have no application to a case where the question is merely between the occupiers of adjoining land; and, even if the duties were identical, the danger in the illustration is concealed, while in the case of the yew tree it is obvious. I think, therefore, that judgment ought to be entered for the defendants.

Judgment for the defendants.

Solicitors for the defendants: *Peacock & Goddard, for T. E. Longman, Andover.*

Solicitors for the plaintiff: *Stocken & Jupp, for E. D. Godwin, Winchester.*

(1) 9 C. B. 392.

W. A.

1894
May 9.

INNES *v.* NEWMAN.

Nuisance—By-law—Making Noise in Streets to Annoyance of Inhabitants—Proof.

A by-law of a borough provided that if any person should make any noise in any of the streets of the borough to the annoyance of the inhabitants he should be guilty of an offence:—

Held, that, upon a summons under the by-law, it was not necessary to prove that more than one inhabitant had been in fact annoyed.

CASE stated by justices.

By a by-law of the borough of Cambridge, it was provided that if any person should make any violent outcry, noise, or disturbance in the market, or in any of the streets or public places of the borough, to the annoyance of the inhabitants of the borough, he should be liable to a penalty.

On March 1, 1894, the respondent, a newspaper-boy, while standing in a street of the said borough opposite the shop of one Matthew, shouted out the name of a newspaper incessantly for the space of six minutes, to the annoyance of the said Matthew. On the hearing of an information preferred against the respondent by the appellant, the police superintendent of the borough, for having made a violent outcry in the street to the annoyance of the inhabitants in contravention of the by-law, no proof was given of any annoyance having been caused by the said outcry to any of the inhabitants except the said Matthew. The justices being of opinion that, in order to justify a conviction under the by-law, it was essential to prove that more than one inhabitant had been annoyed, dismissed the summons, subject to a case for the opinion of the Court.

F. Low, for the appellant.

No counsel appeared for the respondent.

WRIGHT, J. It is clear that if the act complained of is of such a character as to be likely to annoy the inhabitants generally, it is not the less an offence under this by-law because only one inhabitant is in fact annoyed.

COLLINS, J., concurred.

Appeal allowed.

Solicitors for appellant: *Foss & Ledsam.*

J. F. C.

THE BLYTH HARBOUR COMMISSIONERS, APPELLANTS *v.* THE CHURCHWARDENS, &c., OF NEWSHAM AND SOUTH BLYTH AND THE ASSESSMENT COMMITTEE OF THE TYNEMOUTH UNION, RESPONDENTS.

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April 25, 26; *May* 10.

Poor-rate—Harbour Dues—Dues unconnected with Occupation of Land by Commissioners—Rateability.

The appellants, commissioners appointed for the improvement of a harbour, were empowered under special Acts to levy "harbour dues" for all vessels entering the harbour, and "goods dues" and "ballast dues" for all goods and ballast shipped or unshipped at any place within the harbour. The appellants were the occupiers of certain goods quays and ballast quays adjoining the harbour; but the soil of the harbour itself was not vested in them. The facilities afforded by the appellants' quays largely contributed to the amount of the dues received by them; but there were other places in the harbour not occupied by the appellants where vessels might be moored and where goods or ballast might be shipped or unshipped. On appeal against a rate by which the appellants were rated to the relief of the poor in respect of their occupation of the quays:—

Held, that no part of the harbour dues, goods dues, or ballast dues received by the appellants was sufficiently connected with their occupation of the quays to be taken into account as enhancing their rateable value.

CASE stated under 12 & 13 Vict. c. 45.

By a rate made on April 10, 1893, the appellants were rated to the relief of the poor of the township of Newsham and South Blyth, in the Tynemouth Union, in respect of certain "land and the tolls and dues arising therefrom." The appellants were constituted and incorporated by the Blyth Harbour Act, 1882 (45 & 46 Vict. c. liv.), and in them was vested by s. 59 of that Act the undertaking of a company called the Blyth Harbour and Dock Company, which had been authorized under the Blyth Harbour and Dock Acts, 1854, 1858, and 1860, to improve the Blyth harbour, and levy tolls, rates, and dues on vessels entering the harbour, as well as on goods shipped or unshipped there. The Act of 1854, s. 46, empowered the dock company to buy the interests of all persons then entitled to receive tolls or dues in respect of the use of mooring-anchors, mooring-posts and hauling-posts, and lights, and, by s. 47, provided that such tolls were to cease so soon as the company had by execution of the improvement works placed

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itself in a condition to demand the rates prescribed. In pursuance of the powers thus conferred, the company, in January, 1857, bought from Sir M. W. Ridley the tolls and rates leviable and receivable by him for the use of the mooring-posts, buoys, &c., in Blyth Harbour. He was before, and at the time the Act of 1854 passed, seised of the manor and township of Newsham and South Blyth, and of the manor and township of Cambois, and of that part of Blyth Harbour which is within those townships, and of the ground and soil of that part up to high water-mark, and—as "parcel of these hereditaments"—of the tolls and dues so purchased. No vessel could enter the River Blyth from the sea without passing over some portion of the harbour owned by Sir M. W. Ridley, and his right to levy dues extended to all vessels entering the river and harbour, whether they did or did not afterwards enter a part of the river where the soil belonged to other persons. The purchase from him did not convey the soil of the harbour. By s. 57 of the Act of 1858 the company were authorized to demand and receive a rate for all vessels entering the harbour from the sea, and it was declared that that rate should include or be in lieu of the rates bought of Sir M. W. Ridley. By s. 67 the company were authorized to take rates for goods shipped or unshipped, received or delivered, within any dock or basin, or upon or from any wharf, quay, staith, spout, drop, or pier of the company, with a proviso that as to ballast the rates might be demanded in respect of ballast received or delivered by the company at any place within the harbour limits as defined by the Act. These two sections were replaced by ss. 99 and 100 of the Act of 1882, which now empower the commissioners to demand specified rates—(1.) "for every vessel entering the harbour, and for every vessel clearing or departing outwards, and for every vessel remaining within the harbour"; and (2.) "in respect of all goods (i.e., wares, merchandise, and articles of every description) shipped or unshipped, received or delivered, within the harbour." The said rates are herein referred to as "harbour dues" and "goods dues" respectively. In April, 1858, the company bought a piece of land from Sir M. W. Ridley, in the township of Newsham and South Blyth, adjoining the harbour, and it was used first by the company and

then by the appellants until the year 1887 in connection with the harbour and undertaking. A part of this ground is occupied by the appellants as a ballast quay, and in front of the other part the appellants have deepened the harbour so as to provide accommodation for vessels loading coal from elevated staiths placed partly on the appellants' land and partly on land belonging to Sir M. W. Ridley, and exclusively used by the North Eastern Railway Company. In August, 1858, another piece of land was bought by the company and used by them and their successors, the appellants, until 1884 as a quay. A part of it, or a substituted quay, is still so used by the appellants, but the residue is now replaced by a quay made and maintained by the North Eastern Railway Company. Above these quays are also elevated coal staiths, occupied and used by the North Eastern Railway Company. The appellants have habitually dredged and deepened such portions of the harbour as they have thought fit, and have fixed such mooring-posts and buoys as they have deemed necessary, but they are not the owners of nor in possession of the soil of the harbour. The quays, however, belong to and are occupied by them to the extent above indicated. The result of the harbour improvements, including the facilities provided on the pieces of land bought in 1858, has been greatly to increase the trade and augment the appellants' dues. At least one-third of the vessels entering the harbour are berthed or moored alongside these pieces of land, and at least one-third of the goods are shipped or unshipped on or from the same pieces of land; but harbour dues and goods dues would be payable if such vessels were berthed or moored elsewhere in the harbour, and if such goods were shipped or unshipped by means of facilities provided elsewhere in the harbour.

The question for the opinion of the Court was whether the "harbour dues," "goods dues," and "ballast dues," or any or either of them, or any and what part, if any or either of them, ought to be taken into account as enhancing the rateable value of the land in the occupation of the appellants.

Lawson Walton, Q.C. (*T. Willes Chitty*, with him), for the appellants. The dues, being equally payable to the appellants

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by all ships using the harbour, whether berthing alongside the appellants' quays or elsewhere, are not sufficiently connected with the appellants' occupation to render the appellants rateable in respect of them: *Lewis* v. *Overseers of Swansea.* (1) The fact that the existence of such quays contributes to attract shipping to the harbour and so to increase the dues is quite consistent with the dues being dues in gross: *New Shoreham Harbour Commissioners* v. *Lancing.* (2) The case of *Reg.* v. *Berwick Assessment Committee* (3) is also directly in the appellants' favour.

Sir R. Webster, Q.C., Balfour Browne, Q.C., and *Scott Fox,* for the respondents. It is not contended that the appellants are rateable in respect of the whole of the dues received by them, but only in respect of so much of the dues as are paid by ships using their quays. That they are rateable to that extent is clear from the decision in *Reg.* v. *Hull Dock Co.* (4), which case is on all-fours with the present. There, as here, the dues were payable by all ships entering the harbour, whether using the docks or not; but the Court said: "The ship which actually comes into and uses the docks is not the less benefited by them, because the toll must have been paid even if it had not come in; and the benefit conferred by the use of the dock is not the less the meritorious cause of the toll because other ships pay to which that meritorious cause does not apply." The cases of *Earl of Durham* v. *Bishopwearmouth* (5) and *Sutton Harbour Co.* v. *Plymouth* (6) support the respondents' contention.

Walton, Q.C., in reply. There is no power to allocate to the different quays in the harbour the dues payable by the ships respectively berthing there. The dues would be equally received by the appellants if they occupied no quays at all. If they were to lease their quays to the railway company, they would clearly not be rateable for the dues, and the dues could not be taken into account as enhancing the value of the quays in the occupation of the lessees. The case of *Earl of Durham* v. *Bishopwearmouth* (5) is distinguishable on the ground that there the

(1) 5 E. & B. 508.
(2) Law Rep. 5 Q. B. 489.
(3) 16 Q. B. D. 493.
(4) 7 Q. B. 2, at p. 25.
(5) 2 E. & E. 230.
(6) 63 L. T. (N.S.) 772.

soil of the harbour was vested in the appellant, whereas here the case finds that it was not.

Cur. adv. vult.

May 10. The judgment of the Court (Charles and Bruce, JJ.) was delivered by

CHARLES, J. The principal question raised in this case is whether certain dues called "harbour" and "goods" dues which are received by the appellants under and by virtue of the 99th and 100th sections of the Blyth Harbour Act, 1882, for vessels using the harbour and goods shipped or unshipped, received or delivered there, are to be taken into account as enhancing the rateable value of the appellants' premises. There is also a subsidiary question with reference to their liability to be rated in respect of a small sum received by them under the powers conferred on them by the Act of Parliament for ballast. The respondents do not seek to charge the appellants so far as regards harbour and goods rates generally; but they contend that they are entitled to take into account, as enhancing the value of the appellants' rateable hereditaments within their townships, harbour dues received for vessels berthing along the dredged-out piece of land or along the adjoining quays, and goods dues received in respect of goods shipped into or unshipped from those vessels.

Now, the test of rateability is the nature of the dues. If they are dues in gross, the land is not rateable in respect of them; if they are connected with the occupation of the land, it is otherwise. We have, then, to inquire for what they are paid. Are they paid for the use of the quays and mooring-posts, or apart from and independent of such use? It seems clear from the statements in the case that they are paid under a separate obligation and irrespective of the use of the quays altogether. The case therefore, appears to be very similar to *Lewis* v. *Overseers of Swansea.* (1) It was there proved that on the western shore of Swansea Harbour within the borough were quays and wharfs—(1.) occupied by and the property of the corporation; (2.) occupied by the lessees of the corporation; (3.) the property of the Duke of Beaufort. The only mode of landing goods in or shipping

(1) 5 E. & B. 508.

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them from the borough was by using one or other of those three classes of quays and wharfs. For all goods so landed or shipped the corporation received town dues and quayage dues, sometimes called "town dues and quayage dues," sometimes "quayage" only. It was held that these dues were not paid in respect of the use of the land, but were incorporeal and in gross, and that neither the corporation nor their lessees were rateable in respect of any part of the dues. The appellant was lessee of the corporation of the dues, and did not himself occupy any quay; but the case was argued upon the assumption that the corporation as well as their lessee were appealing. In giving judgment, Lord Campbell, C.J., says: "If it is a payment made for the use of the quay, then, when the corporation or their lessee were in occupation of the quay, the value of the toll would properly be taken into account in rating the quay; but if the payment be irrespective of the use of the soil, then the value of the toll could not be so taken into account. Is, then, this a payment for the use of the soil? Primâ facie it would appear to be so, for it is called quayage. But we find that a party not in occupation of the soil may have these dues. It seems to me that such payment is not made for the use of the soil. It is paid for all goods landed on the western side of the harbour. Now, whenever we can ascertain how the case is as to one part of the harbour, we can from that judge of the nature of the payment generally. But we do find in the case of the land of the Duke of Beaufort that the dues are as much payable to the corporation for goods landed there as they are for goods landed on the soil of the corporation. That being so, the toll cannot be corporeal; the payment cannot be for the use of the soil. It is therefore purely incorporeal, and not the subject of rate." And Wightman, J., adds: "The toll is taken without any distinction as to the occupation of the land which is used for the carriage of goods, and it is a mere accident that the corporation are occupiers of a portion of the land. If they had not a foot of land the toll would be equally payable to them." Having regard to the finding in the present case, that the dues are payable whether the quays are used or not, these observations appear exactly applicable to the Blyth Harbour Commissioners, who would receive the dues just as they do at

present even if they did not occupy any of the quays. Another example of the necessity of a connection between the receipt of dues and the occupation of land is to be found in the case of the *New Shoreham Harbour Commissioners* v. *Lancing.* (1) There, under a local and personal Act, commissioners were appointed for the improvement of Shoreham Harbour. The property in all quays erected under the Act was vested in the commissioners, who were empowered to make new piers and to deepen the channel of the harbour. After the piers had been constructed dues were to be paid by every one exporting or importing goods within the limits of the harbour. The commissioners built piers and deepened the channel and received dues on all merchandise brought into the harbour. It was held that they were not occupiers of the soil of the channel so as to be rateable, and that although they were occupiers of the piers and of the soil upon which the piers were built, this occupation was not sufficiently connected with the earning of the dues to make them rateable in respect of the piers. The dues did not enhance the value of those piers, although it was conceded that, if the piers fell into decay, the harbour entrance would probably be choked up and the dues lost. Again, the same principle was applied in *Reg.* v. *Berwick Assessment Committee.* (2) There harbour commissioners had statutory powers to impose tonnage dues upon all ships using the harbour, and shore dues on all goods shipped from or landed on the quays. The soil of the harbour was not vested in the commissioners, but that of the quays was, and they were accordingly properly rated in respect of the latter dues. But those dues were charged only for goods actually laden or unladen on the quays, and the benefit conferred by that use was the meritorious cause of the dues. In this state of things new powers were granted by a later Act for the construction of a wet dock and other works, and fresh dues were substituted for those formerly authorized as follows: (1.) A new shore duty with an addition, on the completion of the wet dock, on goods loaded or discharged in the dock, or on goods exported or imported in vessels of a registered tonnage of 100 tons or upwards; (2.) new and in some respects increased tonnage and

(1) Law Rep. 5 Q. B. 489. (2) 16 Q. B. D. 493.

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harbour dues on all ships entering the harbour from the time of the passing of the Act; and (3.) additional tonnage dues payable on completion of the wet dock on vessels entering the wet dock. It was held, in assessing the commissioners for the wet dock, first, that the general tonnage and harbour duty paid by all vessels must be excluded from consideration, not having been earned in any way by the dock or given for the expense of making it. But, further, it was held that it was wrong to bring into account the whole tonnage dues paid by ships which actually did use the wet dock. The additional 2*d.* and that only was regarded as earned by the dock, and as to the residue the Court was of opinion that it was not earned by the dock at all, because it would have been paid whether the vessels entered the dock or not. The wet dock was not in any way the meritorious cause of anything beyond the added sum. This reasoning appears entirely applicable to the present case, and to lead to the conclusion that the harbour and goods dues cannot be treated as elements in the rateable value of the appellants' premises. It was, however, suggested that the case of *Reg.* v. *Hull Dock Co.* (1) was an authority for the respondents. In that case it appeared that the defendant company were entitled to be paid a certain due on all vessels which entered the harbour of Hull whether they used the dock or not, and it is true that the Court held that there was a distinction between dues received from ships which did use the docks and dues received from ships which did not, and that the defendants were liable in respect of the former and not of the latter. But, as Cave, J., points out in *Reg.* v. *Berwick Assessment Committee* (2), the docks in the *Hull Case* (1) were the sole meritorious cause of the company's right to dues. Now, in the present case the quays are not the sole meritorious cause of the Blyth Commissioners' right. On the contrary, just as in the *Berwick Case* (3), there are other works in the harbour beneficial to ships; so that the dues which all vessels and goods pay, whether the quays are used or not, must be considered as earned by the harbour works and not by the quays. It was further contended by the

(1) 7 Q. B. 2. (2) 16 Q. B. D. at p. 498.
(3) 16 Q. B. D. 493.

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respondents that the commissioners are precisely in the same position as was Sir M. W. Ridley before the sale of these dues, and he would have been rateable in respect of them, inasmuch as he appears to have received them ratione soli. And doubtless his position does appear to be similar to that of the Bishop of Durham (the lessor of the Earl of Durham) in the case of the *Earl of Durham* v. *Bishopwearmouth* (1), and to that of the lords of the manor of Trematon in the case of the *Sutton Harbour Co.* v. *Plymouth.* (2) But it is plain, I think, that whatever may have been the true nature of the dues in the hands of Sir M. W. Ridley, and whether he received them as owner of the soil of the harbour or as owner of the franchise, the appellants do not receive them ratione soli, and the statutes I have referred to must be looked at to find in what character they are received. From those statutes it appears to be clear that the receipt of the harbour and goods dues is no longer, if it ever was, connected with the occupation of the soil of the harbour. These two cases, therefore, do not seem to be authorities on which reliance can be placed by the respondents. It is not necessary to say more as to the subsidiary claim to rate the appellants in respect of the money received for ballast, than that it appears to be governed by precisely the same considerations as the claim in respect of the harbour and goods dues.

In the result, therefore, our judgment is for the appellants with costs.

Judgment for the appellants.

Solicitors for appellants: *Crossman & Prichard, for Dees & Thompson, Newcastle.*

Solicitors for respondents: *Williamson, Hill & Co., for Whitehouse, North Shields.*

(1) 2 E. & E. 230. (2) 63 L. T. (N.S.) 772.

J. F. C.

1894
May 1.

IN RE EVELYN. EX PARTE GENERAL PUBLIC WORKS AND ASSETS COMPANY, LIMITED.

Bankruptcy—Mortgage of Interest by Undischarged Bankrupt—Sale by Mortgagees—Power of Court to Restrain Sale.

An undischarged bankrupt mortgaged a contingent reversion to which he was entitled. The mortgagees, being unable to obtain payment of the mortgage-debt, put up the reversion for sale, subject to the rights of the trustee and of the creditors under the bankruptcy. The trustee thereupon obtained from the judge of the county court having jurisdiction in the bankruptcy a perpetual injunction restraining the mortgagees from proceeding with such sale:—

Held, that the county court judge had no jurisdiction to grant such an injunction.

APPEAL from the decision of the county court judge of Kent.

Mr. E. S. Evelyn was adjudicated bankrupt in the Kent County Court on April 10, 1890, being then possessed of a contingent reversion under the will of Sir George Shee, Bart., which was proved in 1870, in certain valuable estates in Durham. He was still undischarged. The official receiver, who acted as trustee, was released in June, 1893, the creditors having received nothing.

In 1893 the bankrupt borrowed 1500*l.* from the appellant company on the security of the reversion, which, in consequence of the falling in of some lives, had become of greater value. The mortgage deed purported to assign to the appellants all the bankrupt's "right, title, and interest whatsoever and wheresoever, whether absolute or contingent, of, in, and contained in the will of Sir George Shee," and contained a power of sale on non-payment of the mortgage debt. The appellants were aware of the fact that Mr. Evelyn was at the time an undischarged bankrupt.

In October, 1893, the appellants obtained judgment against the bankrupt for the amount of their debt and interest, and in January, 1894, having given notice to the official receiver as the trustee in bankruptcy of the bankrupt, they put up the reversion for sale by auction. The sixth condition of sale was as

follows: "In the year 1890, and previous to succeeding to the immediate reversion now offered for sale, the gentleman through whom the vendor's title is derived was adjudicated bankrupt. Debts believed to amount to an aggregate principal sum of 4218*l.* 4*s.* 2*d.* or thereabouts were proved in this bankruptcy, from which the bankrupt has not been discharged. Unless the concurrence of the trustee shall have been obtained before the day of sale, of which notice shall be given, the property is offered for sale subject to the rights of the trustee and the creditors under the said bankruptcy."

The trustee attended the sale, and protested against its taking place; but the sale proceeded, and the reversion was knocked down for 600*l.*

The trustee then applied to the county court judge for an injunction restraining the appellants, their solicitors, and the auctioneer, from proceeding with the sale.

The judge granted a perpetual injunction, and the appellants appealed.

Herbert Reed, Q.C., and *Muir Mackenzie*, for the appellants. The county court judge had no jurisdiction to make this order. The appellants only assumed to sell such interest as the bankrupt might have after the creditors in the bankruptcy had been satisfied. They only dealt with the surplus, over which a bankrupt always has a right. The sale did not in any way interfere with or affect the right of the trustee to administer the estate of the bankrupt.

[They cited *Bromley* v. *Goodere* (1); *Banks* v. *Scott* (2); *Ex parte Archer* (3); *Ex parte Malachy.* (4)]

Lawson Walton, Q.C., and *Stephen Lynch*, for the trustee in bankruptcy. The order of the county court judge was right. The sale was an interference with the duty of the trustee to administer the bankrupt's estate in the interest of the creditors. Such a sale must be prejudicial to a subsequent sale of the same reversion by the trustee. [They cited *Thomas* v. *Williams* (5);

(1) 1 Atk. 75.
(2) 5 Madd. 493.
(3) 2 G. & J. 110.
(4) 1 M. D. & De G. 353.
(5) 14 Ch. D. 864.

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IN RE EVELYN.

EX PARTE GENERAL PUBLIC WORKS AND ASSETS COMPANY.

Metropolitan Railway Co. v. *Woodhouse* (1); *In re Leadbitter* (2); *Ex parte Sheffield, In re Austin.* (3)]

Herbert Reed, Q.C., replied.

VAUGHAN WILLIAMS, J. Very reluctantly I come to the conclusion that this order of the county court judge is wrong, and that he had no jurisdiction to make it. I will deal with the matter in the first place as if there were no reservation of the rights of the trustee in bankruptcy in the conditions of sale, such as is in fact contained in condition No. 6. Assume that it was a sale, or purported to be a sale merely of property which was vested in the trustee. No contractual relations existed between the trustee and the persons who were said to be the mortgagees of the bankrupt; they were in fact mere strangers. Under those circumstances, even outside the Bankruptcy Court, I think that there would be no right to restrain such a sale by injunction. No action or other proceeding of any kind had been commenced by the trustee in bankruptcy against the appellants. Whether they have done anything which would afford the trustee a good ground of action I do not now decide, but I only say that certainly no such action was pending against them. It is clear that in such a case no injunction to restrain them could be granted.

Next let us look at the case with reference to No. 6 of the conditions of sale, which expressly reserves the rights of the trustee in bankruptcy. It is plain that the appellants were only selling subject to those rights. Under those circumstances, whatever might be the possibility of the trustee taking action, if the property put up for sale were in fact property vested in him, it is quite plain that the appellants did not purport to sell any of his property, but that they only sold subject to his rights. It is manifest that no action by the trustee would lie against the appellants for what they were doing; but even if such an action would lie, I should say that the Court of Bankruptcy was not the proper Court in which to bring it. That point, however, is of no importance now, as Mr. Reed has expressly consented that

(1) 34 L. J. (Ch.) 297. (2) 10 Ch. D. 388.
(3) 10 Ch. D. 434.

we, sitting as a Divisional Court in bankruptcy, shall have power to deal with the whole matter. The outcome of it all is, that under the state of things which exists no cause of action has arisen which would enable the trustee to take proceedings in any court in respect of what has been done by the appellants.

This, however, does not quite put an end to the matter, because even although no action would lie against the appellants, yet the Court of Bankruptcy might have the right to prevent them from interfering with the officer of the Court in the performance of his duty. It is clear law that if the Court thought that a stranger was interfering with the officer of the Court in the performance of his duty, it would have the right to step in and put a stop to such interference. As to that I need only cite the case of *Helmore* v. *Smith* (1), to shew how far the Court will go when it thinks that its officer is being prevented from carrying out his duty. But even that case does not enable us to uphold this order of the county court judge. The application here is of an entirely different character to that in *Helmore* v. *Smith.* (1) I do not say whether a similar motion—a motion for attachment for contempt of court—could or could not be made here. The application in this case, and the order of the county court judge perpetually restraining these gentlemen from selling their interest in this property, must be wrong. It may well be that the Court has power to prevent a sale of any part of a bankrupt's property from being carried out while an administration is pending, if it is of opinion that such a sale would interfere with the due administration of the estate by the officer of the Court; but the sale must be a sale of the same property and of the same interest in that property with which the trustee has to deal. That was not, however, the application before the county court judge, nor was the interest which the appellants were selling the interest with which the trustee had to deal. Without saying that in no case of an attempted sale of property vested in the hands of the official receiver could the Court interfere by injunction to restrain any interference with the carrying out of his duty by the official receiver, I say that in this case the application to the county court judge was in the wrong form, and the order

(1) 35 Ch. D. 449.

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IN RE EVELYN. EX PARTE GENERAL PUBLIC WORKS AND ASSETS COMPANY.

Vaughan Williams, J.

for a perpetual injunction was one which he had no jurisdiction to make. I will only add one further observation. Whatever may be the circumstances under which the Court of Bankruptcy ought to interfere in such a case, it is quite plain that it is especially the duty of the Court to interfere where the person claiming the right to deal with the property claims under the bankrupt himself. As I have said, the order was in my opinion made without jurisdiction, and it follows that this appeal must be allowed.

KENNEDY, J., concurred.

Appeal allowed.

Solicitors for appellants: *G. S. & H. Brandon.*

Solicitors for respondent: *Hadden-Woodward, McLeod, & Blyth.*

A. P. P. K.

C. A.

1894

May 7.

[IN THE COURT OF APPEAL.]

UNDERWOOD, SON, & PIPER *v.* LEWIS.

Solicitor and Client—Retainer in Common Law Action—Refusal of Solicitor to act further during pendency of Action—Action for Costs previously incurred—Entire Contract.

The contract of a solicitor who accepts a retainer in a common law action is, in the absence of agreement to the contrary, an entire contract to conduct the case of the client until the action is finished. He is not entitled, therefore, without good cause, on giving reasonable notice to his client, to decline to act further in the action for him, and thereupon sue for his costs in respect of the previous conduct of the client's case.

APPLICATION of defendant for judgment or new trial.

The action was by solicitors for the amount of a bill of costs.

At the trial before Grantham, J., with a jury, the facts, so far as material to this report, appeared to be as follows. Three actions had been brought against the defendant, one of which was by contractors for work done on premises belonging to the defendant, and the other two were respectively by the architect employed by the defendant in connection with such work for services rendered and commission, and for libel. The defendant retained the plaintiffs to act as his solicitors in the conduct of his defence to such actions respectively. While the actions

were respectively pending, the plaintiffs declined to act further for the defendant in the same; and subsequently brought the action for the amount of their bill of costs in respect of the conduct of the defendant's defence to the actions respectively previously to their so declining to act further. The defence set up was that the plaintiffs were retained by the defendant to act as his solicitors in the actions until they were determined, and, not having done so, they were not entitled to recover. The plaintiffs in their reply alleged certain reasons for their refusal to act further for the defendant in the actions, and that they had given the defendant reasonable notice of their intention not to act further for him. The learned judge at the trial ruled that a solicitor retained in an action was entitled, during the pendency of the action, to decline to act further for the client therein, without shewing any grounds for so doing, provided he gave reasonable notice to the client of his intention to decline to act further, so as to enable the client to obtain the services of another solicitor; and that the solicitor could thereupon sue the client for his costs in respect of the conduct of the action previously to his so declining to act further, subject, however, to the disallowance on taxation of charges for work, if any, that was thrown away in consequence of the solicitor's declining to act further. He therefore held that it was unnecessary to determine any question as to the validity or otherwise of the reasons alleged by the plaintiffs for refusing to act for the defendant, or to go further into the evidence relating thereto. It was not contended that the notice given by the plaintiffs of their intention to decline to act further was not reasonable in point of time; and, therefore, upon the ruling of the learned judge, a verdict and judgment were entered for the plaintiffs for the amount claimed, subject to taxation of the plaintiffs' bill.

Sir H. James, Q.C., and *Jelf, Q.C.* (*Bankes*, with them), for the defendant. A solicitor who is retained in an action at common law is not entitled, at his own will and pleasure, or from motives of his own unconnected with the conduct of the client, to refuse to act further for the client during the pendency of

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the action, and thereupon to sue the client for the costs previously incurred. The authorities clearly shew that the contract of the solicitor upon such a retainer is an entire contract to conduct the case for his client until the end of the action, subject, however, to the right of the solicitor to determine the contract for good cause, giving reasonable notice to his client of his intention so to do: see Resolution in Bankruptcy, per Lord Eldon, in 1801 (1); *Cresswell* v. *Byron* (2); *Harris* v. *Osbourn.* (3) The contract of the solicitor is in this respect like any other contract to perform an entire piece of work; and he cannot, while the special contract still exists and is not completely performed, sue as on an implied contract for work done. As in the case of any other contract, there may be conduct of the client, amounting to a breach of the obligation on his side, which would entitle the solicitor to withdraw from the contract, and sue for work already done and disbursements—e.g., failure by the client to provide the necessary funds if requested to do so. But the contention here is that the solicitor may without any reason withdraw from his contract. There are some expressions in some of the cases—e.g., *Vansandau* v. *Browne* (4); *Harris* v. *Osbourn* (3); *Whitehead* v. *Lord* (5)—which may be relied on for the plaintiffs as proving that the solicitor is entitled, without shewing any cause, to decline to act further for the client during the pendency of an action, on giving reasonable notice to the client; but it is submitted that the true explanation of these expressions is that the only point with which the judges who used them were then dealing was that reasonable notice must be given, not whether or not there must be good cause for the solicitor's declining to act further. [They also cited 1 *Siderfin* 31. pl. 8; *Wadsworth* v. *Marshall* (6); *Bryan* v. *Twigg* (7); *Nicholls* v. *Wilson* (8); *Hawkes* v. *Cottrell* (9); *Harris* v. *Quine* (10); *Stokes* v. *Trumper* (11); *Beck* v. *Pierce.* (12)]

Lockwood, Q.C., and *H. Tindal Atkinson*, (*Winch, Q.C.*, with

(1) 6 Ves. 2.
(2) 14 Ves. 271.
(3) 2 C. & M. 629.
(4) 9 Bing. 402.
(5) 7 Ex. 691.
(6) 2 C. & J. 655.
(7) 3 L. J. (Ch.) 114.
(8) 11 M. & W. 106.
(9) 3 H. & N. 243.
(10) Law Rep. 4 Q. B. 653.
(11) 2 K. & J. 232.
(12) 23 Q. B. D. 316, 323.

them), for the plaintiffs. It is submitted that, whatever may have been the tendency of the earlier authorities, the case of *Vansandau* v. *Browne* (1), and subsequent cases, particularly *Harris* v. *Osbourn* (2) and *In re Hall & Barker* (3), shew that the law is now that a solicitor, on giving reasonable notice to his client, may withdraw from the conduct of a suit, and thereupon may recover the costs in respect of the previous conduct thereof. The contract of the solicitor is no doubt that he will conduct the action till the end, unless he previously determines the retainer by reasonable notice; and, therefore, unless such notice is given, he cannot recover anything before the end of the action. But upon giving such notice he may sue for work previously done. The contract is not like one to do an entire work for an entire sum. The language used by Bosanquet, J., in *Vansandau* v. *Browne* (1), and by Parke, B., in *Harris* v. *Osbourn* (2) and in *Whitehead* v. *Lord* (4), shews that the effect of the solicitor's contract is as contended for by the plaintiffs. The client may at any time determine the retainer, and, that being so, it would be unjust that the solicitor should be bound to go on till the end of the litigation at whatever personal inconvenience to himself. In the ordinary course of things a solicitor would not give up work from which he may derive profit; but cases may be supposed in which, having regard to considerations of health or other circumstances, he might reasonably think it undesirable to continue to act in a litigation; and it would be a great hardship that he should be bound to continue to act or else submit the validity of his reasons to the verdict of a jury; whereas the client is under no corresponding obligation. [They also cited *Rowson* v. *Earle* (5); Tidd's Practice, 9th ed. p. 86.]

Jelf, Q.C., in reply, cited *In re Romer & Haslam.* (6)

LORD ESHER, M.R. I am of opinion that the ruling of the learned judge at the trial was incorrect. When one considers the nature of a common law action, it seems obvious that the law must imply that the contract of the solicitor upon a retainer

(1) 9 Bing. 402.
(2) 2 C. & M. 629.
(3) 9 Ch. D. 538.
(4) 7 Ex. 691.
(5) Mood. & M. 538.
(6) [1893] 2 Q. B. 286.

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in the action is an entire contract to conduct the action to the end. When a man goes to a solicitor and instructs him for the purpose of bringing or defending such an action, he does not mean to employ the solicitor to take one step, and then give him fresh instructions to take another step, and so on; he instructs the solicitor as a skilled person to act for him in the action, to take all the necessary steps in it, and to carry it on to the end. If the meaning of the retainer is that the solicitor is to carry on the action to the end, it necessarily follows that the contract of the solicitor is an entire contract—that is, a contract to take all the steps which are necessary to bring the action to a conclusion. When it is shewn that there were no special terms, but only the ordinary retainer for the purposes of the action, the implication I have mentioned is that which every reasonable person would make, and therefore the implication which the law makes in such a case. This is the view taken by the judges in the older cases which have been cited, e.g., by Lord Eldon when sitting as Chief Justice of the Common Pleas. He says in *Cresswell* v. *Byron* (1): "The Court of Common Pleas, when I was there, held that an attorney, having quitted his client before trial, could not bring an action for his bill." It may perhaps be said that Lord Eldon meant that under no circumstances could an attorney possibly obtain payment for the work done by him unless he continued to act for the client till the conclusion of the action. If he meant to say that, no doubt the rule as laid down by him has been modified; but to engraft a modification on a rule is not to abrogate it altogether. I do not propose to go through all the cases cited, but it seems to me that from that time downwards it has been held that a solicitor cannot sue for his costs until his contract has been entirely fulfilled, unless the case is brought within some recognised exception to the general rule. What are the exceptions to the rule which have been recognised? One such exception the judges have very naturally implied on the only ground upon which judges are entitled to make any such implication, viz., on the ground that any reasonable person would suppose both parties to the contract to have understood and intended to act upon it. This exception must certainly be

(1) 14 Ves. 271.

engrafted on the rule as laid down by Lord Eldon, and I have no doubt that he would have mentioned it himself, if it had been brought to his notice. A solicitor cannot reasonably be expected to disburse out of his own pocket money which he may be unable to get back from his client or the other side, or which at any rate he may be kept out of for a long time. Therefore the Courts have held, because every person of ordinary sense would come to the same conclusion, that the solicitor is entitled, if he thinks right, to ask his client to find money for necessary disbursements; and, if the client fails to do so, the solicitor is entitled to say that he cannot act for the client further, because he does not comply with the obligation which is implied on his part. But it has been held that in such a case a solicitor cannot throw his client over at the last moment, which might be ruin to the client, and, even though the solicitor may have good cause for declining to act further for the client, he must give him reasonable notice of his intention to do so. It is hardly disputed that the law was as I have stated until the case of *Vansandau* v. *Browne.* (1) I cannot make out that the expressions in that case relied on by the plaintiffs really come to anything but this, viz., that, whether the solicitor must have reasonable cause or not, at all events he must give reasonable notice to the client of his intention not to proceed further. *Harris* v. *Osbourn* (2) is a more satisfactory case to my mind. What Lord Lyndhurst said there seems to meet this very case. He said: "I consider that, when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination." It is obvious that by "special contract" he there intends the contract implied by law in this case as opposed to the general contract to do work upon a quantum meruit. He proceeds: "I do not mean to say that under no circumstances can he put an end to this contract; but it cannot be put an end to without notice." He recognises, therefore, that there may be circumstances which justify the solicitor in putting an end to the contract, but says that he cannot do so without giving reasonable notice. The result of what he says seems to me to be that, though there may be valid reasons for giving such a notice, if no such notice is

(1) 9 Bing. 402. (2) 2 C. & M. 629.

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given, the contract of the solicitor is an entire contract, and he cannot sue for his costs before the termination of the action. It has been argued that the doctrine contained in these cases has been exploded by the decision of Jessel, M.R., in *In re Hall & Barker*. (1) I cannot think that that decision had the effect so attributed to it, and, if it had, I think it ought to be overruled. I think that what he really meant to decide was merely that it would be unjust to apply the rule undoubtedly applicable to common law actions in the case of Chancery suits, where the proceedings might be of a very long and complicated character and be divided into several stages, and, if the same implication were made as in the case of a retainer in common law actions, the solicitor might be unable to recover anything for the work he had been doing for a long period of years; that it would be wrong in such cases to make the same implication as in the case of a common law action, because it could not be said that all reasonable people fairly considering the matter would come to the conclusion that both parties must have understood that the solicitor was employed on the terms that he would carry on the litigation until the end. With that decision so construed, we have on the present occasion nothing to do. We are here dealing with the case of actions in the nature of a common law action. I take it that the plaintiffs were employed in each of these actions in the ordinary way, and that not one of them was finished. The learned judge has held that, without any cause shewn, at his own will and pleasure, a solicitor, upon giving a sufficient notice in point of time of his intention so to do, can put an end to the contract, though it is primâ facie an entire contract, i.e., one by which he undertakes that he will carry on the action and not ask for any costs till the end; and that, having done so, he may bring an action for the costs already incurred. I cannot find any authority for this view, which appears to me to destroy entirely that implication with regard to the nature of the contract which I have mentioned, and which appears to me to be grounded on reason and good sense. It seems to me that the decision of the learned judge was wrong, and that the case ought to have gone on in order to see whether

(1) 9 Ch. D. 538.

the solicitors had a reasonable ground for refusing to act further for the client. What may amount to a sufficient ground for such a refusal may not be in all cases clear. It may be doubtful how far matters happening to the solicitor on his side only would affect his contract. The case of the illness or death of the solicitor has been suggested during the argument, and it has been said that such a contingency would not only exonerate him from further performance of the contract, but would also entitle him or his representatives to sue for costs already incurred, although he had not performed his original contract by carrying on the action till the end. It might be argued, on the other hand, that such cases would fall within the general rule applicable to contracts for the performance of some entire piece of work, such as that of a captain of a ship who undertakes to navigate the ship on a particular voyage for an entire sum only to be paid on the completion of the voyage. It is, however, unnecessary for the present purpose to decide that question. For the reasons which I have given, I think that this case must go down for a new trial.

A. L. SMITH, L.J. The question is whether the plaintiffs, who are solicitors, are entitled, under the circumstances of this case, to recover the amount of their bill of costs. I propose to confine my decision to the case now before us, which relates to the retainer of a solicitor in an action at common law. It seems to me clear upon the authorities from the year 1801 down to the present day, that the contract of the solicitor on a retainer such as this is an entire contract, and that, subject to certain limitations, he thereby undertakes to carry on the action till its end. That doctrine is laid down in plain terms in *Harris* v. *Osbourn* (1), where Lord Lyndhurst said, that "when an attorney is retained to prosecute or defend a cause, he enters into a special contract to carry it on to its termination." Again, in *Whitehead* v. *Lord* (2), Parke, B., said: "The rule as applicable to this case was correctly laid down in *Harris* v *Osbourn* (1), that an attorney, under a retainer to conduct a suit, undertakes to conduct the suit to its final termination, and that he cannot

(1) 2 C. & M. 629. (2) 7 Ex. 691.

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sue for his bill until that time has arrived, subject, however, to the exception there stated, and subject also to the additional exception which arises upon the death of the client, in which case he can sue the personal representatives." I do not find that this doctrine, so far as it applies to common law actions, is really dissented from by Jessel, M.R., in *In re Hall & Barker.* (1) He there says that he will not adopt it in relation to the suits in equity then before him, but he enunciates it as the principle applicable in the case of common law actions. Then, again, in the case of *In re Romer & Haslam* (2) the same principle is enunciated. Therefore primâ facie the contract of the solicitor, when he accepts a retainer in a common law action, is an entire contract to carry on the action till it is finished, and he cannot sue for costs before the action is at an end. On the other hand, it is clear that the solicitor may be placed in such a position by the client as to absolve him from the further performance of that contract. It appears to me from the case of *Vansandau* v. *Browne* (3) and subsequent cases which have been cited, that the client may put the solicitor in such a position as to entitle him to decline to proceed; for instance, if the solicitor asks for necessary funds for disbursements, and such funds are refused by the client, the solicitor is not bound to go on; and, speaking for myself, I should say that the solicitor is not bound to go on acting for the client if the client insists on some step being taken which the solicitor knows to be dishonourable; and many other cases may be supposed in which the solicitor may be entitled to refuse to act for the client any further. I should say that, when a solicitor is in a position to shew that the client has hindered and prevented him from continuing to act as a solicitor should act, then upon notice he may decline to act further; and in such case the solicitor would be entitled to sue for the costs already incurred. But we have not now to deal with such a case. The sole question here is, whether the solicitor is entitled without rhyme or reason to throw up his retainer, having given due notice of his intention to do so. I do not think that he is so entitled. The expressions used by judges in the case of *Vansandau* v. *Browne* (3) and cases

(1) 9 Ch. D. 538. (2) [1893] 2 Q. B. 286 (3) 9 Bing. 402.

subsequent to it, which have been relied upon for the plaintiffs, may be summed up as amounting to this, viz., that at any rate the solicitor cannot throw up his retainer without giving due notice. Most of these cases have arisen with regard to the Statute of Limitations. The client having set up the Statute of Limitations in answer to an action by a solicitor for costs, the question was whether the retainer which had been accepted had been put an end to, so that the solicitor's right of action had accrued and the statute had commenced to run. The judges held that notice was necessary in order to put an end to the retainer, and, no such notice having been given by the solicitor, the retainer was a continuing one; and, the contract being an entire one, the statute had not begun to run. So interpreted, the expressions relied on for the plaintiffs seem quite consistent with the view that notice cannot be given by the solicitor to determine his retainer except for good cause. The learned judges who made use of these expressions do not seem to me to have had their minds directed to the point whether, due notice being given, the solicitor can throw up his retainer without rhyme or reason. I think that the law is that he cannot do so in a common law action. The learned judge at the trial held that he could. I do not think that decision was correct.

DAVEY, L.J. I am of the same opinion. I so entirely agree with the reasons given by the Master of the Rolls and my learned brother, A. L. Smith, L.J., that I do not think it necessary to add anything. I only desire to say, that I express no opinion on the question what the effect would be of a solicitor's death or becoming personally incapacitated pending the action.

Application for new trial granted.

Solicitors for plaintiffs: *Underwood, Son, & Piper.*
Solicitors for defendant: *Letts Brothers.*

E. L.

C. A.
1894
April 20.

[IN THE COURT OF APPEAL.]

COULSON *v.* DISBOROUGH.

Practice—Evidence—Witness called by Judge—Cross-examination.

At the trial of an action the judge has power to call and examine a witness who has not been called by either of the parties, and, when he does so, neither party has a right to cross-examine the witness without the leave of the judge.

If the evidence of the witness given in answer to questions put to him by the judge is adverse to either of the parties, leave should be given to that party to cross-examine the witness upon his answers, but a general cross-examination ought not to be permitted.

MOTION by the plaintiff for judgment or a new trial of the action. At the trial by Bruce, J., with a jury, a verdict was found for the defendant.

The action was for false imprisonment and malicious prosecution. The plaintiff was a domestic servant, and she was engaged to be married to the son of the defendant. The defendant kept a public-house. The plaintiff was spending some hours one evening at the defendant's house, and while she was there the defendant charged her with stealing 1*l.* 4*s.* 6*d.* belonging to him. He said that the money had been taken out of a bag which was hanging up in the bar parlour, and that the coins which had been taken were marked. A police constable was sent for, and the plaintiff was taken to the police station, and was there searched. The sum of 19*s.* 3*d.* was found in her possession, and it consisted in part of three florins, which were marked. The plaintiff said that these florins had been given to her the same evening by the defendant's son in payment of a debt which he owed her. The plaintiff was tried for the alleged theft and was acquitted. She then brought this action. The defence was that the defendant had reasonable and probable cause for what he had done, and that he did not act maliciously. At the trial, after the witnesses on both sides had been examined, and counsel on both sides had addressed the jury, the jury expressed a wish that the defendant's son, who was in Court, but who had not been called by either party as a witness, should be called. The learned judge called him and asked him whether

he had taken the money out of the bag, and whether he had given any money to the plaintiff on the evening in question. The son answered both questions in the negative. The plaintiff's counsel asked the judge to allow him to cross-examine the son; but the learned judge refused the application.

Warburton, and *Sydney Knox*, for the plaintiff. The application for a new trial is made on the ground of misreception of evidence. The judge ought not himself to call a witness who has not been called by either of the parties, and then to refuse to allow him to be cross-examined on behalf of either party who desires to cross-examine him. In Taylor on Evidence (7th ed. vol. 2, p. 1243), it is said that "the judge has always a discretionary power, with which the Court above is very unwilling to interfere, of recalling witnesses at any stage of the trial, and of putting such legal questions to them as the exigencies of justice require." Nothing is said about any power of the judge to call a witness who has not been already called by one of the parties, and it is submitted that there is no such power. At any rate, an opportunity of cross-examining the witness should be given. The questions put to the son by the judge, and his answers to them, were calculated to prejudice the jury. His evidence must have influenced them, and the judge ought to have told them to disregard it as being irrelevant. If the plaintiff's counsel had cross-examined him, it is probable, or at least possible (and that is enough), that the jury would have found for the plaintiff.

Candy, Q.C., and *Calvert*, for the defendant. The course taken by the judge was not unprecedented.

[A. L. SMITH, L.J. I think it was unusual.]

If the defendant honestly believed that the plaintiff had stolen the money he was entitled to a verdict. The onus was on the plaintiff to prove the want of reasonable and probable cause, and that the defendant acted maliciously. If both these things were not proved the jury must necessarily have found for the defendant. The son's evidence was irrelevant to these issues. The jury were naturally desirous to hear the evidence of the son, because insinuations had been made against him. The defendant's counsel could not call him; they had nothing to ask him.

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LORD ESHER, M.R. Upon the findings of the jury, judgment was in my opinion rightly entered for the defendant on both points. It is said that the judge, in calling a witness who had not been called by either party to the action, did that which was unusual and without precedent. The action had nothing to do with the question whether the plaintiff was or not guilty of the theft; the defendant did not allege that she was; and after her acquittal it must be taken that she was innocent. The question in this action was, What was in the defendant's mind when he prosecuted the plaintiff? The evidence of the son could have no bearing on that question, unless he were prepared to say that, before his father prosecuted the plaintiff, he had told him that he himself had taken the money out of the bag. Unless he could say that, his evidence was immaterial upon the issues in this action. If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge, in my opinion, is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before. When a witness is called in this way by the judge, the counsel of neither party has a right to cross-examine him without the permission of the judge. The judge must exercise his discretion whether he will allow the witness to be cross-examined. If what the witness has said in answer to the questions put to him by the judge is adverse to either of the parties, the judge would no doubt allow, and he ought to allow, that party's counsel to cross-examine the witness upon his answers. A general fishing cross-examination ought not to be permitted. In the present case the answers of the son had no real bearing upon the issues in the action, and the only reason for cross-examining him must have been a wish to prejudice the jury. In my opinion there was no miscarriage, and the motion must be refused.

A. L. SMITH, L.J. A witness called in this way is the witness of the judge, not of either of the parties. It is the function of the judge to try and find out the truth, whether he is hearing the case with or without a jury. Neither party can cross-examine a witness so called as of right; the leave of the judge must be

obtained. The answers of the son were immaterial as regarded the issues in the action, and in my judgment the learned judge in this case was right in refusing to permit him to be cross-examined, and in entering judgment for the defendant.

DAVEY, L.J., concurred.

Application refused.

Solicitors: *W. H. Armstrong; G. W. W. R. Harrison.*

W. L. C.

HARPER, APPELLANT; MARCKS, RESPONDENT.

1894
May 23.

Criminal Law—Cruelty to Animals—Domestic Animals—Caged Lions—The Cruelty to Animals Act, 1849 (12 & 13 *Vict. c.* 92), *ss.* 2, 29—*The Cruelty to Animals Act,* 1854 (17 & 18 *Vict. c.* 60), *s.* 3.

The respondent kept five full-grown lions in a cage, and gave for profit a public performance in which he entered the cage with a lady dancer, who danced whilst he, being armed with a whip and a strong pole, kept the lions in subjection. Afterwards one of them was made to jump over a board. Except in those respects the lions did not differ in any way from wild animals kept in confinement:—

Held, that the lions were not "domestic animals" within the meaning of 12 & 13 Vict. c. 92, s. 29, and 17 & 18 Vict. c. 60, s. 3, and therefore that the respondent could not be convicted on an information charging him with cruelly treating them.

CASE stated by one of the metropolitan police magistrates under the Summary Jurisdiction Acts.

The respondent was summoned to appear before the magistrate at the Westminster Police Court upon an information preferred by the appellant, an officer of the Society for the Prevention of Cruelty to Animals, charging that the respondent, at the Royal Aquarium, Westminster, did cruelly beat, ill-treat, abuse, and torture certain lions.

The evidence given by the appellant and his witnesses at the hearing of the information, and the magistrate's decision thereon, were stated in the case as follows:—

The lions in question are five in number, full-grown, and between four and five years old. They are kept in a large cage five yards long by four wide in the Imperial Theatre inside the Aquarium. There the public are admitted at an extra charge

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to see the performance in the cage described in the following paragraph.

A lady, who is known as a "skirt dancer," enters the cage accompanied by the respondent armed with a formidable whip in one hand, and a strong pole with a steel head to it in the other. With the aid of these weapons the lions are kept in subjection whilst the lady dances, and subsequently one of the lions was made to jump over a board several times.

According to the evidence of the appellant, considerable violence was used with the whip; but for the purposes of this case it is not to be assumed that any cruelty was used by the respondent, as his witnesses were not called in consequence of my decision as hereinafter set out.

In no sense, except as above stated, did these lions differ in any way from any other animals kept in confinement at the Zoological Gardens or elsewhere.

After duly considering the facts, and bearing in mind the distinction between domestic animals and those of a wild nature, as pointed out in the judgments in *Budge* v. *Parsons* (1) and *Filburn* v. *People's Palace and Aquarium Co.* (2), I was clearly of opinion that a lion, even when kept in confinement, cannot be said to be a domestic animal within the meaning of s. 29 of 12 & 13 Vict. c. 92. (3) I therefore dismissed the summons.

If the Court should be of opinion that these lions are domestic animals, the case is to be remitted to me to be further dealt with on the question whether they were cruelly used or not. If the

(1) 3 B. & S. 382.

(2) 25 Q. B. D. 258.

(3) By 12 & 13 Vict. c. 92, s. 2: "If any person shall cruelly beat, ill-treat, over-drive, abuse, or torture, or cause, or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding 5*l*."

By s. 29: "The word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal."

By 17 & 18 Vict. c. 60, s. 3: "The words and expressions to which a meaning is affixed by 12 & 13 Vict. c. 92, and which are introduced into this Act, shall have the same meaning in this Act, and the word 'animal' shall in the said Act and in this Act mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act, or of any other kind or species whatever, and whether a quadruped or not."

Court should be of opinion that these animals do not come within that section of the Act, my judgment is to stand.

Willis, Q.C. (*Colam*, with him), for the appellant. The learned magistrate's decision was wrong. He seems to have been of opinion that under no circumstances could a lion become a "domestic animal" within the meaning of 12 & 13 Vict. c. 92, s. 29. "Domestic" means "domesticated." The individual, not the species, is contemplated. It is admitted that a wild animal recently caught and confined is not a domestic animal, but such an animal may become domesticated, though it retains some of its savage qualities. With respect to animals other than those specified in s. 29, the question is one of fact and of degree in each case, having regard to the state and condition of the animal when it is subjected to the cruelty alleged. The question depends upon the length of time during which the animal has been placed under control, and the way it has been dealt with. Where, as in the present case, the animal has been sufficiently brought under control to take part in a public performance for its master's profit, and has been trained to do certain acts in the course of that performance, it has become domesticated, and therefore a "domestic animal" within the meaning of the statute. *Aplin* v. *Porritt* (1) is distinguishable, because nothing had been done to render domesticated the wild rabbits, which had been caught five days before the alleged cruel treatment of them. The distinction is shewn in *Swan* v. *Sanders* (2), where Grove, J., pointed out that wild parrots might under some circumstances become domestic animals. In *Colam* v. *Pagett* (3) it was held that linnets caught, kept in captivity, and used as decoys for the purpose of bird-catching, were domestic animals within the statute. The facts with respect to the control and training of the lions here bring the case within the principle of that decision.

No counsel appeared for the respondent.

Bonsey, watched the case on behalf of the Treasury.

CAVE, J. I am of opinion that the answer to the question raised in the case must be that these lions are not domestic

(1) [1893] 2 Q. B. 57. (2) 50 L. J. (M.C.) 67.
(3) 12 Q. B. D. 66.

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animals within the meaning of the Acts. They are really wild animals in confinement, neither more nor less; and wild animals in confinement are not yet brought within the protection which the Acts give. Those Acts are of very modern date; and, no doubt, the public feeling which enabled them to be passed has been gradually accumulating and strengthening. It may be that Parliament at some future time will think fit to provide for the protection against cruel treatment of all wild animals kept in confinement; but at present it has not done so. I am of opinion that the words of the enactments in question are intended to comprise all such animals as have been tamed to serve some useful purpose for mankind. The words "or any other domestic animal" in s. 29 cannot, it seems to me, be extended beyond the features which the animals specified in the Act possess generally; and the only general feature with respect to those animals is that they are all tamed to serve some purpose for the use of man. In some cases, no doubt, animals have been so dealt with and altered as no longer to resemble the wild stock from which they came. I do not say that that is essential in order to bring them within the protection of the Acts; but you must at the least shew that the animal has been sufficiently tamed to serve some purpose for the use of man. The mere caging and keeping in captivity a wild animal is not enough to make it a domestic animal. The strongest case in the appellant's favour is *Colam* v. *Pagett.* (1) There linnets—undoubtedly wild birds originally—had been trained so as to be used for decoys to catch other birds. In that way the linnets had been made subservient to the use of man; and, if the decision in that case is to be supported, it must be supported on that ground, and on that ground only. It is impossible to say that a wild animal kept in a cage becomes by the mere fact a domestic animal. In the present case the evidence by which it is sought to make out that these lions are domestic animals does not go far enough. It only goes so far as to shew that they are kept in a cage and prevented by terror from obeying their natural instinct to tear the dancer to pieces. I am of opinion that our judgment should be for the respondent.

(1) 12 Q. B. D. 66.

WRIGHT, J. I am of the same opinion. I will only add that I agree with the argument for the appellant to this extent, that animals, however wild by nature, may become domestic under some circumstances. I should think that leopards trained to hunt for their master, otters trained to catch fish, and elephants trained to assist in the capture of wild elephants, might be held to be domestic. Speaking for myself, I should be prepared, if necessary, to say that they were. Domestic is not the same thing as domesticated, but I think that an animal ought to be regarded as a domestic animal which is of a kind ordinarily domesticated, and which is in fact itself domesticated.

Judgment for the respondent.

Solicitors for the appellant: *Lindsay, Greenfield, & Masons.*

W. A.

THE QUEEN *v.* RICHARDSON AND OTHERS.

1894
May 25.

Poor Law — Pauper "entitled" to Periodical Payments — Application of Guardians for Order for Payment—Justices—Jurisdiction (Petty Sessions) —Whether Justices have Jurisdiction where Pauper's right disputed— Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 23.

By s. 23 of the Divided Parishes and Poor Law Amendment Act, 1876: "Where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same to the pauper may from time to time pay to the board of guardians of any union or parish, out of the instalments which have become due, the cost incurred in the relief of such pauper accrued since the last instalment;" and where such trustee or other person declines to make such payment, the guardians may apply to the justices at petty sessions, who may, "if satisfied that it is right under all the circumstances to do so," make an order upon him to pay the requisite amounts then due to the guardians, provided that they or their relieving officer have declared the relief to be given on loan.

On an application by guardians for an order under the above section, the pauper's right to the periodical payment in question was disputed by the persons alleged to be bound to make it:—

Held, that the justices had no power to hear and determine the matter of the application, because s. 23 made it a condition precedent to the exercise of their jurisdiction that the right of the pauper to receive the periodical payment should be undisputed.

RULE, obtained on behalf of the board of guardians of the Houghton-le-Spring Union, in the county of Durham, calling

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upon two justices of the county of Durham, and upon the Northumberland and Durham Miners' Permanent Relief Fund Friendly Society, to shew cause why the justices should not proceed to hear and determine the matter of a complaint preferred by the board of guardians against the society.

The complaint was laid under s. 23 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61) (1), and charged "that John Wilkinson, being an aged member of the above-named society, is entitled to the periodical payment to him of the sum of four shillings weekly out of the funds of the said society, and that the said John Wilkinson is a pauper resident in the workhouse of the Houghton-le-Spring Union, and is relieved by the guardians of the said union and chargeable to the common fund thereof, such relief having been declared by the guardians to be by way of loan, and that there is now due from the said society in respect of such periodical

(1) Sect. 23: "Where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same to the pauper may from time to time pay to the board of guardians of any union or parish, out of the instalments which have become due, the cost incurred in the relief of such pauper accrued since the last instalment, and such payment shall be a legal discharge to such trustee or other person for so much money as shall have been so paid."

"Where any trustee, manager, or other person shall decline to make any payment, the guardians may apply to the justices in petty sessions assembled, and such justices may, if satisfied that it is right under all the circumstances to do so, make an order upon him to pay the requisite amounts then due to the guardians at once, and to pay from time to time in future as the liability in respect of the relief arises thereafter."

"Provided that this clause shall not have effect unless and until the guardians or their relieving officer shall have declared the relief to be given on loan, nor in respect of any relief granted contrary to the rules and orders made under the authority of the statutes in that behalf."

By the Poor Law Amendment Act, 1879 (42 & 43 Vict. c. 12), s. 1, where a pauper, having no wife or relative dependent upon him for maintenance, is entitled to receive any moneys as a member of any friendly or benefit society, no claim shall be made under s. 23 of the Divided Parishes and Poor Law Amendment Act, 1876, upon any such society of which he is a member, or against any branch thereof, unless and until the guardians or their relieving officer shall have declared the relief to be given on loan, and shall have, within thirty days thereof, notified the same in writing to the secretary or trustees of the society or branch of which the pauper . . . is a member, and as such entitled to receive any payment."

payment or weekly sum the sum of 1*l.* 4*s.*, which sum the said society have declined to pay to the said guardians in respect of the said relief."

The following material facts appeared from the affidavits used in support of and against the rule:—

In April, 1884, John Wilkinson was a member of the Northumberland and Durham Miners' Permanent Relief Fund Friendly Society, registered under the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60), and he then became entitled, as an aged member, to relief under rule 51 of the rules of the society, which provided that the benefits to aged and infirm members should be four shillings per week. Thenceforward, until November, 1893, the sum of four shillings per week from the Aged and Infirm Members Fund of the society was paid in respect of John Wilkinson's claim as an aged member.

Rule 20 of the rules of the society as originally made provided that any dispute or difference arising between any member, or person claiming on account of any member or under the rules of the society, and the society or its officers "may be" referred to arbitration in the manner prescribed by the rule, and that the decision of the arbitrators "shall be final, binding, and conclusive upon the parties without appeal." In August, 1889, the society, being a society to which the provisions of s. 30 of the Friendly Societies Act, 1875, apply, obtained, under the Friendly Societies Act, 1889 (52 & 53 Vict. c. 22), a certificate of exemption from the provisions of s. 30 of the Friendly Societies Act, 1875 (1), and subsequently in the same year they amended

(1) Sect. 30 of the Friendly Societies Act, 1875, applies to friendly societies receiving contributions by means of collectors at a greater distance than ten miles from the registered office of the society.

By sub-s. 10: "In all disputes between a society and any member, . . . or any person claiming through a member . . . or under the rules, such member or person may, notwithstanding any provisions of the rules of such society to the contrary, apply to the county court, or to the court of summary jurisdiction for the place where such member or other person resides, and such Court may settle such dispute in manner herein provided."

By the Friendly Societies Act, 1889, s. 1, a friendly society which is subject to the provisions of s. 30 of the Friendly Societies Act, 1875, may obtain from the Chief Registrar of Friendly Societies, with the approval of the Lords Commissioners of the Treasury, a certificate of exemption from the provisions of s. 30, in any case in which he is of opinion that the society is not one to which those provisions ought to apply.

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rule 20, under the powers of amendment and alteration given by the rules, by (inter alia) making the reference to arbitration compulsory.

On February 29, 1890, John Wilkinson became chargeable to the common fund of the Houghton-le-Spring Union, and was admitted an inmate of the Houghton-le-Spring Workhouse.

At the annual meeting of the society held in June, 1891, rule 51 was altered by adding, "If an aged member who is in receipt of relief goes into the workhouse, this four shillings shall not be paid."

The society, under protest, paid John Wilkinson's allowance to the workhouse authorities from December, 1889, to November, 1893, but in the latter month refused to make any further payments to such authorities.

In January, 1894, John Wilkinson having no wife or relative dependent upon him for maintenance, the guardians passed a resolution declaring that the relief to him was given on loan, and duly notified the same to the society in accordance with the provisions of the Poor Law Amendment Act, 1879, s. 1.

Subsequently the guardians laid their complaint. At the hearing thereof the society disputed John Wilkinson's right to receive the weekly payment on the grounds that he was still in the workhouse, and that, under the addition made to rule 51, he was precluded from receiving such payment, and they took the objection that the justices had no jurisdiction to hear and determine the matter of the complaint until John Wilkinson had applied for arbitration, and otherwise complied with rule 20, which neither he nor the guardians had done.

The justices were of opinion that they had no jurisdiction, and refused on that ground to hear and determine the matter of the complaint. Thereupon this rule was obtained.

A. A. B. Baker, (*Lawson Walton, Q.C.*, with him), shewed cause. The decision of the justices was right. John Wilkinson was clearly not "entitled" to the periodical payment of four shillings within s. 23 of the Divided Parishes and Poor Law Amendment Act, 1876. His title to receive that sum being disputed, a reference to arbitration under the rules of the society was necessary. Until it was admitted, or had been settled by

arbitration, that he was entitled, the justices had no jurisdiction to entertain the application.

[He was stopped.]

Poland, Q.C., and *Alexander Glen*, supported the rule. The justices had jurisdiction. The pauper clearly was entitled to receive the periodical payment notwithstanding the addition made to rule 51, because he did not come within the words, "if an aged member, who is in receipt of relief, goes into the workhouse." He went into the workhouse before the addition to the rule was made, and the added words have no retrospective effect. In *Reg.* v. *Justices of Swindon* (1), and in *Caistor Union* v. *Cleaver* (2), the right of the pauper to receive payment from the friendly society of which he was a member was disputed by the society; but the justices nevertheless heard and determined applications by the guardians under s. 23, though it is true that this point was not taken in either of those cases. The guardians here were not bound to go to arbitration under rule 20 of the rules of the society, because that rule does not apply to them.

[CAVE, J. Surely it does; they were claiming "on account of" a member of the society.]

It is submitted that the guardians are merely in the position of creditors of the pauper. The statute does not put them in any other position; it merely deals with the procedure which the creditors may take to obtain payment of their debt.

CAVE, J. I am of opinion that this rule should be discharged. Sect. 23 of the Divided Parishes and Poor Law Amendment Act, 1876, provides, that "where any pauper shall be entitled to any annuity or periodical payment," the trustee or other person bound to make payment of the same may pay the cost of the pauper's relief out of such annuity or periodical payment. That the pauper should be "entitled" to the annuity or payment is a condition upon which the whole of the section depends; and I see no indication of any intention on the part of the legislature that the justices should decide the question whether he is entitled or not. It is true that, where the trustee or other person bound to pay refuses on any ground to make payment,

(1) 42 J. P. 407. (2) 56 J. P. 503.

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the justices are interposed between the trustee or other person and the guardians, and the trustee or other person cannot be compelled to pay unless the justices are satisfied that it is right, under all the circumstances, to make the order for payment to the guardians; but that does not give the justices power to decide the question of title. The question for the consideration of the justices is whether the relief ought to be paid to the pauper or to the guardians. The language of the section is calculated to apply to cases in which it is admitted that the pauper is entitled to the payment; but I see nothing in that language which enables the justices to entertain the matter, whether there is, or is not, a dispute between the society and the pauper with respect to his title to receive the payment at all. If the words had been "where any pauper claims to be entitled," &c., then the argument addressed to us for the applicants would be well founded; but, on the contrary, the words which the legislature has used make it a condition precedent to the justices' power to deal with the case that the pauper shall admittedly be entitled to the annuity or periodical payment. Here there is a dispute as to whether he is entitled or not; and that dispute must be settled by arbitration under the rules of the society before the matter can be dealt with by the justices. This is the only point we have to decide; and I prefer to base my judgment on that ground only. At the same time, I do not wish it to be understood that I agree with the construction, suggested by Mr. Poland, of the addition made by the society to rule 51. It is not for us, but for the arbitrators, to decide that point, and I do not decide it; but I wish to guard against it being said that we accepted his construction. I think there is a good deal to be said on the other side before it is adopted.

WRIGHT, J. I am of the same opinion. The guardians can only be entitled to what the pauper is entitled to, and in order to ascertain what he is entitled to you must resort to the rules of the society. Before the justices can entertain the matter, it is necessary to consider and determine, as between the members of the family of the society, a dispute with respect to the meaning of the rule which provides that if any aged member in receipt of

relief "goes into the workhouse" his four shillings per week shall not be paid. The dispute is whether that rule means that an aged member who went into the workhouse before the rule was made is entitled to receive his four shillings per week afterwards, or whether the rule only applies to aged members who go into the workhouse after it was made. That dispute must be settled by arbitration. I am of opinion that the justices were quite right in declining to hear and determine the matter before them, when it was neither admitted, nor had it been settled by arbitration under the rules, that the pauper was entitled to the payment.

Rule discharged.

Solicitors for the applicants for the rule: *Croft & Mortimer, for J. J. Bentham, Sunderland.*

Solicitors for the friendly society: *Dix & Warlow.*

W. A.

KEEBLE *v.* BENNETT AND ANOTHER.

1894
May 29.

County Court—Costs—Action commenced in High Court—Payment of part of Claim after Action brought—Transfer of Action as to Residue to County Court—Recovery of Residue in County Court—Scale applicable to Taxation of Costs in County Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

In an action to recover 104*l.* the defendant, in pursuance of an order made upon an application by the plaintiff for leave to sign final judgment, paid 90*l.* to the plaintiff's solicitor, and the action as to the balance of 14*l.* was transferred to the county court; the 14*l.* was paid into court in the county court:—

Held, that the plaintiff had recovered 104*l.* in the action, and was therefore entitled to have his costs in the county court taxed upon Scale C, applicable where the amount recovered exceeds 50*l.*, and not upon Scale A, which applies where less than 20*l.* is recovered.

APPEAL from an order of the judge of the Southwark County Court allowing taxation of the plaintiff's costs upon Scale C, applicable where the subject-matter or the sum recovered exceeds 50*l.*

The action was originally brought in the High Court to recover a sum of 104*l.* 19*s.* 9*d.* for goods sold and delivered. Upon an application under Order XIV. for leave to sign final

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judgment an order was made that unless the defendants paid to the plaintiff's solicitors 90*l.* 7*s.* within five days, the plaintiff should be at liberty to sign judgment for that amount; that the defendants should be at liberty to defend the action as to the residue of the claim, and that the action as to such residue should be transferred to the Southwark County Court. The 90*l.* 7*s.* was paid in compliance with the order, and the action as to the residue (14*l.* 12*s.* 9*d.*) was duly transferred to and entered for trial in the county court. Shortly before the day fixed for the trial the defendants paid the 14*l.* 12*s.* 9*d.* into the county court. The plaintiff thereupon made an application to the county court judge for an order for his costs, and the county court judge, being of opinion that he had recovered a sum exceeding 50*l.* in the action, made an order allowing his costs upon Scale C. The defendants appealed.

Cababé, for the defendants. The order was wrong, and the plaintiff should only have been allowed his costs upon Scale A, which applies where the subject-matter or the sum recovered is less than 20*l.* The effect of the order made upon the application for leave to sign final judgment was that, as to 90*l.*, the action was finally determined in the High Court, and that it was converted into an action for 14*l.* only before it was sent to the county court at all; the county court never had jurisdiction in this action for a sum exceeding £20, and judgment could not be entered for more than 14*l.* The amount recovered in the superior Court cannot be added to that recovered in the county court for the purpose of determining the scale of costs applicable in the latter court. The effect of s. 65 of the County Courts Act, 1888 (51 & 52 Vict. c. 43) (1), is that the plaintiff gets his

(1) By 51 & 52 Vict. c. 43, s. 65, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or is reduced to that amount, either party may obtain an order to have the action tried in the county court, "and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court."

costs up to the date of the order upon the Supreme Court scale, and his costs after that date upon the county court scale applicable to the amount recovered. The present case is distinguishable from cases where the whole action is transferred to the county court with or without the imposition of the term of payment into Court as a condition of leave to defend; in those cases the whole amount recovered is recovered in the county court, but in the present case the substantial part of the claim was recovered before the action ever got into the county court at all. If the order of the county court judge is right, two results must follow: the plaintiff would have been entitled to his costs on Scale C, however small the sum he had recovered in the county court, and the defendant, if successful, would have been entitled to his costs on the same scale, although, if he had paid the 90*l.* before action he could only have got costs on Scale A, as the action would only have been for 14*l.*, and must have been brought in the county court.

[He cited *Harris* v. *Judge* (1); *White* v. *Cohen.* (2)]

Paget, for the plaintiff, was not called upon.

CAVE, J. I am of opinion that the order of the county court judge was right. The order made upon the application under Order XIV. seems to me to be not strictly in the form in which it should be drawn. When an action is remitted to the county court, all the subsequent proceedings are to be taken in that court; and, if the defendants had not paid the 90*l.* in compliance with the order, I doubt whether judgment could have been entered against them in the High Court five days after the action had been remitted to the county court. But such an objection to the form of the order could have been cured by directing the action to be remitted immediately after the entry of judgment for, or the payment of, the 90*l.* However that may be, the action has been remitted; and it is an action to recover 104*l.*, of which 90*l.* has been paid to the plaintiff by virtue of proceedings taken while the action was still in the High Court, so that in the county court the plaintiff recovered 14*l.* only. The only question really

(1) [1892] 2 Q. B. 565. (2) [1893] 1 Q. B. 580.

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is, Did the plaintiff recover 104*l.* in the action? I am clearly of opinion that he did, under an order made in the action while it was still in the High Court. If that is so, there is an end of the matter, and the order of the county court judge was properly made.

COLLINS, J. I am of the same opinion upon the same grounds

Appeal dismissed.

Cababé asked for leave to appeal.

CAVE, J. We give leave upon the ground of the general importance of the case; but our doing so must not be taken to intimate that we have the slightest doubt about it.

Solicitors for plaintiff: *Meggy & Stunt.*
Solicitors for defendant: *Swepstone & Co.*

W. J. B.

1894
April 10.

BASSETT *v.* TONG.

County Court — Jurisdiction — Remitted Action — Action for Unliquidated Damages—Indorsement of Amount of Claim upon Writ—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.

There is no power under s. 65 of the County Courts Act, 1888, to remit an action for unliquidated damages to a county court, even where the writ is indorsed with a claim for a specified sum.

APPEAL from an order made by the district registrar at Great Grimsby upon an application under s. 65 of the County Courts Act, 1888, by which the action was sent for trial in the Great Grimsby County Court.

The action had been commenced in the High Court by a writ indorsed with a statement of claim in the following terms:—

"The plaintiff's claim is for damages for the breach of a contract for the sale and delivery by the defendant to the plaintiff of forty tons of bones at 3*l.* 2*s.* 6*d.* per ton, to be delivered free on board a vessel at the River Head, Grimsby, in February, 1894.

"Particulars of damage.

"Loss of profit at 1*l.* 17*s.* 6*d.* per ton on 40 tons	£75	0	0
"Half amount of freight of vessel to receive said bones	8	0	0
	83	0	0."

The plaintiff took out the summons upon which the order was made, remitting the action to the county court; the defendant appealed, and the appeal was referred by Wright, J., at chambers to the Court.

Etherington Smith, for the defendant. The claim being for unliquidated damages there was no jurisdiction to remit the action to the county court, notwithstanding that the writ was indorsed with a claim for a specified sum. That was the case in actions sent to the county court for trial under the County Courts Act, 1856: *Knight* v. *Abbott* (1), where it was held that the words "claim indorsed on the writ" in s. 26 (2) of that Act had no reference to an action for unliquidated damages. The power of remitting actions to the county court for all purposes was first

(1) 10 Q. B. D. 11.

(2) By 19 & 20 Vict. c. 108, s. 26, where in any action of contract brought in a superior Court, the "claim indorsed on the writ" did not exceed fifty pounds . . . a judge of a superior Court, on the application of either party after issue joined, might order the cause to be tried in a county court.

By 30 & 31 Vict. c. 142, s. 7, where in any action of contract brought in a superior Court the "claim indorsed on the writ" did not exceed fifty pounds . . . the defendant might within eight days of the service of the writ apply for an order that the action be tried in a county court; the judge was to make the order, in the absence of good cause to the contrary, and all subsequent proceedings were to be taken in the county court as though the action had been originally commenced there.

By 36 & 37 Vict. c. 66, s. 67, the provisions contained in (inter alia) s. 7 of the County Courts Act, 1867, are to apply to all actions commenced or pending in the High Court in which any relief is sought which can be given in a county court.

By 51 & 52 Vict. c. 43, s. 65, where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.* . . . either party may at any time apply at chambers for an order that the action be tried in a county court . . . and the action and all proceedings therein are to be tried and taken in such Court as if the action had been originally commenced therein.

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given by s. 7 of the County Courts Act, 1867, which applied to actions of contract where the "claim indorsed on the writ" did not exceed fifty pounds; it has never been suggested that the section applied to anything but claims for liquidated damages, and its language is practically the same as that of s. 65 of the County Courts Act, 1888. It is true that the language of s. 67 of the Judicature Act, 1873, is somewhat wide, but it did not remove any of the restrictions created by previous statutes.

[WRIGHT, J. It seems to me that s. 67 of the Judicature Act, 1873, meant to strike out of the Act of 1867 the words "indorsed on the writ," and that the draftsman of the Act of 1888 put them in again. What is the proper interpretation to be placed on those facts?]

That there being a doubt whether the Act of 1873 had had the suggested effect, the doubt was solved by expressly restoring the words in the Act of 1888; s. 65 of that Act only applies where the "claim indorsed on the writ" does not exceed, or is reduced to, 100*l*. This is not a "claim indorsed on the writ," which must be a statement of claim specially indorsed under Order III., r. 6; the phrase does not mean anything written on the back of a writ which a plaintiff may choose to call an indorsement. In the forms of indorsements given in Appendix A, Part III., no figures are inserted in the case of a claim for damages, and the mere insertion in the present case of the figures or items which make up the claim for damages does not make the indorsement "a claim indorsed on the writ" within the meaning of the section. It has been the invariable practice at chambers not to remit actions for unliquidated damages under s. 65 of the Act of 1888.

Acland, for the plaintiff. The order was rightly made. It is true that at first sight *Knight* v. *Abbott* (1) seems to some extent an authority to the contrary; but that decision proceeded upon s. 26 of the Act of 1856, which gave a power of sending an action to the county court for trial only, and neither had the same object nor used the same language as s. 65 of the Act of 1888; the point decided was that, as there used, the words "claim indorsed on the writ" could only refer to a claim for a debt or liquidated demand indorsed under the provisions of the Common

(1) 10 Q. B. D. 11.

Law Procedure Act, 1852. Moreover, in that case the attention of the Court was not drawn to s. 67 of the Judicature Act, 1873, which applies the provisions of s. 7 of the Act of 1867 to all actions commenced in the High Court in which any relief is sought which can be given in a county court. The language of that section is wide enough to include all actions of whatever nature which can be brought in a county court, whether for liquidated or unliquidated demands, and its effect is to remove the restriction imposed by the words "claim indorsed on the writ," if they have the sense contended for by the defendant, leaving the amount of the claim as the only limit to the county court jurisdiction. The provisions of s. 7 of the Act of 1867 are substantially the same as those of s. 65 of the Act of 1888, and the latter section should be read in the same way as the former, that is, as being extended by s. 67 of the Judicature Act, 1873. The expression "indorsed on the writ" in s. 65 of the Act of 1888 should not be interpreted in the restricted sense of "specially indorsed," it means simply "written on the back of the writ"; in the rules of the Supreme Court "indorsed" and "indorsement" are constantly used in this sense, and where it is intended to refer to a special indorsement, as in Order III., r. 6, apt language is used; this could equally have been done by the framers of the County Courts Act, 1888, who were familiar with the meaning of a special indorsement.

WRIGHT, J. I must confess to feeling very great doubt about this case. I am inclined, however, to come to the conclusion that it would be better not to interfere with the established practice at chambers; and, therefore, as the matter is urgent, I do not reserve my judgment. The Act of 1856 contained in s. 26 a provision by which in certain cases an action might be sent from the High Court to the county court for trial; but that power was restricted to cases where the claim indorsed on the writ did not exceed 50*l*. Upon that section, *Knight* v. *Abbott* (1) was argued, and it was decided by Field and Stephen, JJ., that an unliquidated demand did not come within the purview of the section, because, at the date of the Act, the only meaning which

(1) 10 Q. B. D. 11.

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Wright, J.

could be attributed to the expression "claim indorsed on the writ" was a special indorsement as authorized by the Common Law Procedure Act, 1852. In that case s. 67 of the Judicature Act, 1873, does not seem to have been referred to. We come now to the County Court Act, 1867, s. 7, which provided that where in any action of contract the sum indorsed on the writ did not exceed 50*l.*, the action might, on the defendant's application, be remitted to the county court, not merely for trial, but with the result that it became for all purposes, subsequent to remittal, a county court action. It is impossible to doubt the meaning of that section; under it nothing but liquidated demands could be remitted, for nothing could at that time be indorsed on the writ except matters which could properly form the subject of a special indorsement. Then came the Judicature Act, 1873, s. 67 of which did, in my opinion, clearly remove from s. 7 of the Act of 1867 the limitation imposed by the words "claim indorsed on the writ." We should not, I think, be giving its full effect to s. 67 if we did not hold that, while leaving the limit of 50*l.*, and also the bar created by the nature of certain actions, as restrictions on the county court jurisdiction, it removed the restriction formerly imposed by the words "claim indorsed on the writ" in all actions where the writ was indorsed with an amount within the county court jurisdiction. That section does not seem, as I have before said, to have been noticed in *Knight* v. *Abbott.* (1)

We come now to the County Courts Act, 1888. The effect of s. 67 of the Judicature Act, 1873, had been, in my opinion, to strike out of s. 7 of the Act of 1867 all reference to liquidated demands as creating a restriction upon its operation; the Act of 1888 repealed the Act of 1867, but by s. 65 re-enacted s. 7 in practically the same words. We must now say how s. 65 of the Act of 1888 is to be applied to s. 67 of the Act of 1873. We might conceivably hold that, notwithstanding the use of the words "claim indorsed on the writ" in s. 65, that section must be read subject to s. 188, sub-s. 3, of the same Act, which provides that "any enactment or document referring to any Act or enactment hereby repealed shall be construed to refer to this Act or to the corresponding enactment in this Act," and so apply

(1) 10 Q. B. D. 11.

s. 67 of the Judicature Act, 1873, to s. 65 of this Act in the same way that it was applied to s. 7 of the Act of 1867. But it is, in my judgment, the safest course to say that we follow what we understand to be the established practice of interpreting s. 65 as applicable only to cases of liquidated demands—a practice which receives some support from the decision in *Knight* v. *Abbott* (1), and which has been adopted as the recognised practice in the text-books—and to leave the Court of Appeal to set us right if our view is wrong. The order of the district registrar will therefore be reversed.

BRUCE, J. I am of the same opinion. The words "claim indorsed on the writ" were used in s. 26 of the Act of 1856, and as there used they received a judicial interpretation in *Knight* v. *Abbott* (1), a decision which has never been questioned. It is argued, however, that the effect of s. 67 of the Judicature Act, 1873, was to strike out those words from s. 26 of the Act of 1856, and s. 7 of the Act of 1867. Assuming that to be so, we find nevertheless that in s. 65 of the Act of 1888 the same words are deliberately inserted, and I think we are right in drawing the inference that the legislature when so inserting them intended them to have the same meaning as they had in the earlier County Court Acts, and so took away the power of remitting to the county court actions for unliquidated damages—that is, actions in which the claim is not, in the strict sense of the words, a claim indorsed on the writ.

WRIGHT, J. I wish to add that upon the other construction of s. 65 there would be nothing to guide the judge in the exercise of his discretion upon an application to remit an action for unliquidated damages. It may be that a further enactment or a new rule is desirable enabling such actions to be remitted to the county court.

Appeal allowed.

Solicitors for plaintiff: *Clarkson, Greenwells & Co., for J. Barker, Great Grimsby.*

Solicitors for defendant: *Hicks & Son, for H. E. & R. Mason, Great Grimsby.*

(1) 10 Q. B. D. 11.

W. J. B.

1894
May 1.

DIBB v. BROOKE & SONS.

Bankruptcy—Partnership—Assets—Execution levied against Firm—Bankruptcy of one Partner—Right of Trustee to Proceeds of Levy—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), s. 11.

By s. 11, sub-s. 2, of the Bankruptcy Act, 1890, where the goods of a debtor are sold under an execution in respect of a sum exceeding 20*l.*, the sheriff shall deduct his costs of the execution from the proceeds of sale, and retain the balance for fourteen days; and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against him, the sheriff shall pay the balance to the official receiver or trustee, who shall be entitled to retain the same as against the execution creditor.

Execution in respect of a sum exceeding 20*l.* levied against a firm by seizure and sale of the partnership goods. Within fourteen days from the sale one of the partners presented his petition in bankruptcy, and a receiving order was made against him, due notice of the petition being given to the sheriff:—

Held, that s. 11, sub-s. 2, did not apply, and that the official receiver was not entitled as against the execution creditors to the net proceeds of sale in the hands of the sheriff.

APPEAL from the decision of the judge of the Manchester County Court on an interpleader issue.

Brooke & Sons, the defendants in the interpleader issue, having recovered judgment for a sum of 47*l.* against the firm of Cockshoot & Kelvey, execution was issued on that judgment. On October 13, 1892, the sheriff of Cheshire, under a writ of fieri facias, seized, and on October 21, 1892, sold, the joint goods of the partnership to satisfy the judgment debt. On November 3, 1892, Cockshoot presented his petition in bankruptcy. On the same day a receiving order was made against him; C. J. Dibb was duly appointed receiver of his estate, and notice of the petition having been presented, and of the receiving order having been made, was given to the sheriff by Cockshoot's solicitor, acting for him in the bankruptcy proceedings. On November 4, 1892, a similar notice was given to the sheriff by C. J. Dibb. On November 8, 1892, Cockshoot was adjudged a bankrupt, and by an order of the county court his estate was ordered to be administered in a summary manner in pursuance of s. 121 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). In the absence of any

resolution at the first meeting of Cockshoot's creditors that any other person than C. J. Dibb should be appointed trustee in the bankruptcy, C. J. Dibb became and remained such trustee. As official receiver and trustee of Cockshoot's estate he subsequently commenced an action in the county court for a dissolution of the partnership between Cockshoot & Kelvey, and in July, 1893, obtained an order that the partnership should be wound up; that the dissolution thereof as and from November 8, 1892, should be advertised as therein directed, and by the same order he was appointed receiver of the partnership estate and effects. Notice that such action had been commenced was given to the sheriff by C. J. Dibb, who claimed the sum in the sheriff's hands representing the net proceeds of the sale of October 21, 1892. Subsequently an interpleader order was made on the application of the sheriff, whereby it was ordered that the net amount in his hands should remain in his possession until further order; that the parties should proceed to the trial of an issue in which C. J. Dibb should be plaintiff, and Brooke & Sons defendants, and that the question to be tried should be, "whether the money now in the hands of the sheriff is the property of the said claimant as against the execution creditors." The interpleader proceedings were transferred to the Manchester County Court, and at the trial of the issue by the county court judge he gave judgment for the claimant. In delivering his judgment the learned judge said that he considered he ought to follow the opinion expressed in a passage in Lindley on Partnership (6th ed. p. 692), with reference to the effect of s. 11 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). (1)

(1) Sect. 11: "(1.) Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge."

"(2.) Where under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from

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The execution creditors appealed, and on the appeal coming before a Divisional Court, it was, by consent, adjourned in order that it might be heard before the Divisional Court hearing bankruptcy appeals from county courts.

H. Reed, Q.C. (*A. Clarke Williams*, with him), for the appellants. The passage from Lindley on Partnership, on which the county court judge founded his judgment, applies only (even if the second proposition suggested in it be correct) where the act of bankruptcy precedes the levy. That was the case in *Barker* v. *Goodair* (1), *Dutton* v. *Morrison* (2), and *Re Wait.* (3) Those cases only exemplify the general rule that where execution is issued against a firm, and before that execution is completed one of the partners becomes bankrupt, the partnership assets will, in the interest of the joint creditors, be applied by the Court of Bankruptcy in paying all the joint creditors pari passu, and the assignee of the bankrupt has only a right to the bankrupt's share of the surplus. The rule, and the reason for it, is stated in *Dutton* v. *Morrison* (4), and *Re Wait* (3) does not carry it further. But it is clear that neither under that general rule, nor by virtue of the Bankruptcy Act, 1890, does any title to the proceeds of the execution become vested in the trustee in bankruptcy of the

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the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor."

The passage in Lindley on Partnership is as follows: "The above clauses apply as well to cases where one partner is bankrupt, and the same partner is the execution debtor, as to those where all the partners are bankrupt, and all are execution debtors; it will also be probably held to apply where one partner only is bankrupt, and the execution is against the firm for a partnership debt (*v*); provided that the Court is in a position to ensure a proper distribution of the assets of the firm amongst the creditors thereof."

A note (*v*) to the above is: "Following the analogy of the old law; see *Barker* v. *Goodair* (11 Ves. 78; 8 R. R. 89) and *Dutton* v. *Morrison* (17 Ves. 210); see too *Re Wait* (1 J. & W. 610); *Anon* (12 Mod. 446)."

(1) 11 Ves. 78; 8 R. R. 89.

(2) 17 Ves. 193.

(3) 1 J. & W. 605.

(4) 17 Ves. 193, at pp. 209, 210.

single partner. Sect. 11 only applies where the "debtor" is the person to whom the goods taken in execution belong. It is clear from the language of both the sub-sections that their provisions do not apply where the execution is against joint debtors, and one of them subsequently becomes bankrupt. The statute has not given any new legal or equitable right to the trustee; it has only given a mode of enforcing the right he had before. After the bankruptcy of one of the partners the solvent partner can receive and give a good discharge for the partnership assets: *Ex parte Owen.* (1) The trustee in the bankruptcy only becomes a tenant in common with him of those assets—*Woodbridge* v. *Swann* (2)—and at common law a creditor of the firm, who is paid his debt by the solvent partner after the bankruptcy of the other, has a good defence to an action at law by the assignees of both: *Harvey* v. *Crickett.* (3) The solvent partner may sell the partnership assets after the bankruptcy of his co-partner: *Fraser* v. *Kershaw.* (4) The joint creditors cannot prove in the bankruptcy of the single partner: *Ex parte Janson, In re Corf* (5); *Ex parte Kensington* (6); *Re Carpenter.* (7) Under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87, which section corresponds to s. 11 of the Act of 1890, it was held that, although an execution levied by seizure and sale of a debtor's goods for a debt over 50*l.* was an act of bankruptcy, it was not necessarily a void proceeding, and that the execution creditor was entitled to the proceeds of sale notwithstanding a supervening bankruptcy, if he had no notice of a prior act of bankruptcy, and no notice of a petition for adjudication had been given to the sheriff under s. 87 within fourteen days after the sale: *Ex parte Villars, In re Rogers.* (8) Here the execution creditors are entitled to the proceeds of sale under the ordinary rule—stated by the Court of Appeal in *Richards* v. *Jenkins* (9)—that where the evidence shews that the claimant had not any interest in, nor the possession of, the goods at the time of seizure, the execution creditor is entitled to succeed in the interpleader issue. The fact that the trustee

(1) 13 Q. B. D. 113.
(2) 4 B. & Ad. 633.
(3) 5 M. & S. 336.
(4) 2 K. & J. 496.
(5) 3 Madd. 229.
(6) 14 Ves. 447.
(7) 7 Morr. 270.
(8) Law Rep. 9 Ch. 432.
(9) 18 Q. B. D. 451.

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in the present case has been appointed receiver in the proceedings for a dissolution of the partnership gives him no right to the proceeds of the sale by the sheriff. A receiver, as such, has no rights; he only represents the parties: *In re Sacker, Ex parte Sacker.* (1)

Muir Mackenzie, for the respondents. The act of bankruptcy was the levying of execution by seizure and sale of the partnership goods. The title of the trustee in bankruptcy of the bankrupt partner related back to the act of bankruptcy, and the trustee became entitled as from that time to administer the partnership assets in the hands of the sheriff according to the old law, as stated in *Barker* v. *Goodair* (2), *Dutton* v. *Morrison* (3), and *Re Wait.* (4) By allowing execution to be issued and levied against the firm, the solvent partner abandoned his right to administer those assets by paying all the joint creditors pari passu, and the trustee thereupon became entitled to have the proceeds of the sale handed over to him by the sheriff for the purpose of having them so administered by the Court of Bankruptcy. The passage in Lindley on Partnership is justified by the observations of Lord Eldon, L.C., in *Barker* v. *Goodair.* (5) Sect. 11, sub-s. 2, of the Bankruptcy Act, 1890, should be construed having regard to the law established by the decisions referred to in that passage. At any rate, the trustee became entitled to the proceeds of sale when he was appointed receiver in the proceedings for a dissolution of the partnership.

H. Reed, Q.C., replied.

VAUGHAN WILLIAMS, J. I am of opinion that the decision of the learned county court judge on this interpleader issue was wrong, and that he ought to have given judgment for the defendants. I gather from his judgment that he thought so too; but he considered that he was bound by a passage in Lindley on Partnership. To my mind, that view of the county court judge was altogether wrong in principle. He was bound to exercise his own judgment, and in doing so could only be controlled by decided cases. If there were cases decided by the superior

(1) 22 Q. B. D. 179.
(2) 11 Ves. 78; 8 R. R. 89.
(3) 17 Ves. 193.
(4) 1 J. & W. 605.
(5) 11 Ves. 78, at pp. 85, 86.

Courts, he was bound to follow the principles laid down in those cases; but he could not in any proper sense of the word be said to be bound by a statement which was merely the dictum of the author of a text-book, and not a judicial decision. That statement is this: "The above clauses apply as well to cases where one partner is a bankrupt and the same partner is the execution debtor, as to those where all the partners are bankrupt and all are execution debtors." No one would dispute that statement; but the passage goes on: "It will also be probably held to apply where one partner is bankrupt, and the execution is against the firm for a partnership debt." I think, with great deference to Lindley, L.J.'s, authority, if he put that passage in his book, that the last proposition is inaccurate. I see that in the note it is said: "Following the analogy of the old law: see *Barker* v. *Goodair* (1); *Dutton* v. *Morrison* (2): see too, *Re Wait* (3); *Anon.* (4)" I do not suppose the passage in the text was meant to go beyond what those cases decide, and all that they really decide is this: If before the execution is completed something happens which makes the property cease to be the property of all the partners, and vests an interest in somebody else—that somebody else being the trustee in the bankruptcy of one of those partners—then the Court of Bankruptcy, exercising in this respect the jurisdiction of a Court of Equity, will, in the interest of the joint creditors, restrain the execution creditor from going on with his execution, and will take upon itself to order an account to be taken of the joint estate, and then will distribute the proceeds amongst the joint creditors rateably, and hand over the surplus, if any, to the solvent partner. The decisions in those cases were undoubtedly an interference with the right of a solvent partner; but, as I understand them, an interference which is justified by the facts that an execution has been put in, and that the solvent partner, by allowing that to be done, has abandoned his right of administering the joint estate. There is, however, nothing in those cases to suggest that the judges who decided them thought that the joint assets vested in the assignee in bankruptcy. There is, therefore, nothing in them to shew

(1) 11 Ves. 78, at pp. 85, 86.
(2) 17 Ves. 193.
(3) 1 J. & W. 605.
(4) 12 Mod. 446.

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Vaughan Williams, J.

that the trustee in bankruptcy gets a title to the joint assets in such a case as the present, and there is nothing whatever to shew that the 11th section of the Act is, by some analogy to those decisions, to be construed as applying to such a case. You are not entitled to construe an Act of Parliament by any analogy of that sort; and if you were entitled so to construe the Act, the analogy would not help you here. I therefore prefer to construe the Act irrespective of the proposition stated in Lindley on Partnership, and in doing so I should say that I fully assent to the proposition that the words of the Act only entitle you to apply sub-s. 2 of s. 11 in cases where the debtor whose goods are seized, and the debtor, of a bankruptcy petition against whom the sheriff receives notice within the fourteen days, are the same person. Here they are not the same person. The execution debtors were these two partners, and only one of them presented a petition and had a receiving order made against him. It seems to me that there is nothing in s. 11 to divest the title of the solvent partner in the goods themselves, or to vest the title to the proceeds of the sale in the trustee. It would be an inconvenient result if the Act were so construed that, upon the bankruptcy of one partner, the proceeds of the partnership goods should become vested in the trustee merely because an execution had been put in upon the partnership goods and carried out to the point of sale. For these reasons I think there was no title in the trustee, and that the county court judge's decision was wrong.

As to the point taken, that possibly the trustee had a title as receiver in the action for a dissolution of the partnership, I do not think we can take that point into consideration here. The county court judge, it seems to me, gave his decision solely on the ground that he was bound to hold that s. 11 gave to the trustee in bankruptcy of the one partner a title to the proceeds of the execution levied upon the partnership goods. As the matter came before him, I think that was the only question which he could have decided.

KENNEDY, J. I am of the same opinion. In the interpleader issue the plaintiff had to make out, as against the defendants,

that he was entitled to the proceeds of sale of the partnership property. In my opinion he did not make it out. He sought to make it out under s. 11, and under that section the county court judge held that the plaintiff was entitled to the proceeds. I think that the words of s. 11 do not cover a case of this kind. At any rate, they do not cover it in such a way as to give the trustee in bankruptcy of one of two joint debtors the right to say, "I have a title to the proceeds of the execution levied upon the joint estate." The county court judge appears to have been guided by what he considered to be the expression of an opinion, in a text-book of very high authority, as to what would be held in such a case as this. Looking at the authorities cited in the note to the passage in question, I think that the respondent has failed to bring this case within any principle laid down in those authorities. It is clear to me that the proceedings in 1893, under which the trustee became receiver in the action for a dissolution of the partnership, cannot affect the title he claims in this interpleader issue. I am of opinion that this appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *May, Sykes, & Batten, for J. Cooke, Hyde.*

Solicitor for respondent: *Solicitor of the Board of Trade.*

W. A.

1894
May 31.

HOLLAND AND ANOTHER v. LESLIE.

Practice—Amendment—Writ for Service out of Jurisdiction—Statement of Claim indorsed on Writ—Power to amend Statement of Claim—Order XI.; Order XXVIII., rr. 1, 6.

The provisions of Order XXVIII. as to the amendment of indorsements and pleadings apply to writs issued for service out of the jurisdiction, and a statement of claim indorsed on such a writ may be amended without the necessity of re-serving the writ or notice thereof upon the defendant after amendment.

Where leave for such amendment is necessary, the plaintiff must shew that the amended claim is in respect of a cause of action which would have entitled him, had it been preferred in the first instance, to leave to issue a writ for service out of the jurisdiction.

APPEAL from a decision of Lawrance, J., at chambers, allowing the plaintiffs to amend the statement of claim indorsed upon the writ.

The defendant, a foreign subject residing in the United States, was the acceptor of two bills of exchange, one for 45*l.* 19*s.* 6*d.*, falling due upon April 4, 1893, the other for 42*l.* 10*s.*, falling due upon May 4, 1893; the plaintiffs were the holders of both bills. The first bill was not paid at maturity. Upon May 4, 1893, the plaintiffs received from the defendant a cheque for 45*l.* 19*s.* 6*d.*, which they by mistake credited against the bill falling due that day instead of against the bill which had matured on April 4. On July 14 the plaintiffs, in pursuance of leave obtained, issued a writ for service out of the jurisdiction against the defendant, and notice of the writ was in due course served upon him; the claim indorsed upon the writ was in respect of the first bill for 45*l.* 19*s.* 6*d.*, together with a balance of an account for goods sold and delivered. The defendant entered an appearance, and a defence was put in, in which, among other defences, payment was pleaded. The plaintiffs then discovered their mistake, and took out a summons (their time for reply having expired) to amend the statement of claim indorsed on the writ by substituting the acceptance for 42*l.* 10*s.* instead of that for 45*l.* 19*s.* 6*d.*, and an order was made by the learned judge upon terms as to costs. The defendant appealed.

Watt, for the defendant. There was no jurisdiction to allow this amendment. The powers of amendment given by Order XXVIII. do not apply to the case of a defendant out of the jurisdiction so as to entitle a plaintiff to amend his writ by inserting a wholly different cause of action not contemplated by the original writ. Order XI. is in itself a complete code as to service out of the jurisdiction, and no such power of amendment is conferred by that order. If such an amendment is made it can only be made subject to the provisions of Order XI. as to service, and the amended writ must be re-served in the same way as the original writ. The application involved the substitution of one cause of action for another, and was in effect an application for leave to serve a new writ; there was therefore no jurisdiction to grant the application unless it was supported by an affidavit, as required by Order XI., r. 4. [He cited *Diamond* v. *Sutton* (1); *Roberts* v. *Worsley* (2); *The Cassiopeia* (3); *In re Hartley.* (4)]

Lewis Thomas, for the plaintiffs. The order was right. After appearance to a writ for service out of the jurisdiction the parties are before the Court for all purposes, and there is nothing to exclude the operation of Order XXVIII. as to amendment in such actions. The plaintiffs would have been entitled, under Order XXVIII., r. 2, to amend their statement of claim without an order had the time for reply not expired, and all that was necessary was to shew to the judge that the plaintiffs had a cause of action which, if indorsed on the writ in the first instance, would have entitled them to leave to issue the original writ. An affidavit was unnecessary, and no objection was taken at the time to its absence.

Watt, in reply.

CAVE, J. Two points have been made in this appeal on behalf of the defendant: first, that the judge had no power to make this amendment at all; and, secondly, that the facts upon which his order was made were not verified by affidavit. As to the first, it was contended that Order XXVIII. does not apply to an action against a foreigner residing out of the jurisdiction, and

(1) Law Rep. 1 Ex. 130.
(2) 2 Cox, Eq. 389.
(3) 4 P. D. 188.
(4) [1891] 2 Ch. 121.

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that, if an amendment is made, the process must be gone through of serving the writ again after the amendment, and in effect starting the action afresh. I am of opinion that this contention is not well founded. There is nothing in the rules, and there is no decided case, to shew that Order XXVIII. does not apply where leave has been given to issue a writ for service out of the jurisdiction; the result of holding the contrary would be monstrous, and would entail an amount of inconvenience and expense so great that, without the strongest evidence that such was the intention of the framers of the rules, I should not come to that conclusion. None of the cases cited to us goes the length of saying that the plaintiff in such an action cannot amend the indorsement on his writ without re-serving the writ upon the defendant; the parties are actually before the Court, the defendant has appeared by his solicitor, and all proper terms for the protection of the defendant will be insisted upon by the judge. When a different cause of action is substituted for that originally indorsed on the writ, the judge will satisfy himself that the conditions which would be applicable to the original application for leave to issue a writ are also applicable to the amended cause of action; but the question must be whether there is evidence to satisfy him that the facts stated would have entitled the plaintiff to leave to issue an original writ, and if he is so satisfied all has been done that is necessary to entitle the plaintiff to make the amendment.

In the second place, it is contended that the amendment was made upon a statement of facts which was not verified by affidavit. If the party takes the objection at chambers that the judge has not the proper evidence before him, he cannot make the order; the opposing party is entitled to have the facts upon which the order is founded placed upon affidavit, upon terms as to costs in proper cases. I am, however, not satisfied in the present case that the point was taken before the judge in chambers. The appeal must be dismissed.

COLLINS, J. I am of the same opinion upon the same grounds.

Appeal dismissed.

Solicitor for plaintiff: *W. H. Herbert.*

Solicitors for defendant: *Webster & Webster.*

W. J. B.

ASPINALL *v.* SUTTON.

1894
May 10, 11.

Practice—Case stated by Justices—Transmission of Case to Court—Lodging Case in Crown Office—20 & 21 Vict. c. 43, s. 2.

By 20 & 21 Vict. c. 43, s. 2, upon an appeal by way of a case stated against a decision of justices, the appellant must, within three days after receiving the case, "transmit" it to the Court:—

Held, that in order to satisfy the requirements of the section, the case must be lodged by the appellant at the Crown Office within the three days.

SPECIAL case stated by justices of Buckinghamshire under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, upon an appeal against a conviction for the breach of a bye-law.

The case had been received from the justices on Friday, April 13, by the appellant's solicitors, who, alleging that the justices had made a mistake in fact in the statement of the case, telegraphed to them on the same day asking that a copy of the depositions might be attached to the case; the next day (Saturday) the justices telegraphed an affirmative reply. On Monday, April 16, a clerk to the appellant's solicitors went to Buckinghamshire to serve the respondent (a police-constable) with notice of appeal and a copy of the case, as required by 20 & 21 Vict. c. 43, s. 2; but owing to a difficulty in finding him and effecting service, the clerk was unable to return to town in time to lodge the case at the Crown Office before four o'clock that afternoon. The case was lodged early on the following morning.

May 10. *Hammond Chambers*, for the respondent. There is a preliminary objection to the hearing of this appeal: the requirements of s. 2 of 20 & 21 Vict. c. 43, have not been complied with. That section requires the appellant to transmit the case to the Court within three days, and as Sunday is not excluded in calculating those days, the case should have been lodged on the Monday. "Transmit" must be interpreted as "lodge in Court"; that was clearly the opinion of the majority of the Court in *Banks* v. *Goodwin* (1), although it was not necessary

(1) 32 L. J. (M.C.) 87.

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there to decide the point. [He also cited *Pennell* v. *Churchwardens of Uxbridge.* (1)]

Courthope Munroe, for the appellant. The word "transmit" ought not to receive the suggested interpretation; it is satisfied if steps are taken within the three days to start the case on its way to the Court. The appellant has done all that was possible to comply with the provisions of the Act.

May 11. WRIGHT, J. We have consulted the officers of the Crown Office, and we find that the practice is perfectly settled. A case stated by justices must be lodged at the Crown Office within three days after its receipt by the appellant. We must therefore give effect to the objection.

Solicitor for appellant: *A. W. G. Ranger.*
Solicitors for respondent: *Pyke & Parrott.*

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June 5.

[IN THE COURT OF APPEAL.]

COLE *v.* ELEY.

Solicitor—Lien—Charging Order—Assignment of Property recovered in an Action—Priority—Notice of Solicitor's right to a Lien—"Purchaser for Value without Notice."—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

Sect. 28 of the Solicitors Act, 1860, provides for the making of an order declaring a solicitor employed in any suit, matter, or proceeding, in any court of justice, entitled to a charge upon the property recovered or preserved for his costs, and that all conveyances and acts done to defeat such charge shall, "unless made to a bonâ fide purchaser for value without notice," be void as against such charge.

A solicitor had acted for the plaintiff in an action, which was compromised by the defendant's agreeing to pay a sum of money to the plaintiff by instalments. The plaintiff assigned for valuable consideration the money payable to him under the compromise to a person who had been a witness in the action. It was not proved that express notice of the claim of the plaintiff's solicitor for costs had been given to the assignee. Subsequently to the assignment the solicitor obtained a charging order upon the money recovered in the action for his costs:—

Held (affirming the judgment of a Divisional Court) that the assignee, being aware that the subject-matter of the assignment to him was money recovered

(1) 31 L. J. (M.C.) 92.

in an action, in which the solicitor had acted for the plaintiff, must be taken to have had notice of the solicitor's rights in respect of his costs, and therefore was not "a purchaser for value without notice" within the meaning of the Act; and consequently that the solicitor was entitled to a charge upon such money in priority to the assignee.

Faithfull v. *Ewen* (7 Ch. D. 495) followed.

APPEAL from order of a Divisional Court (Charles and Collins, JJ.), affirming an order made at chambers charging the money recovered in an action with the plaintiff's solicitor's costs.

The facts are stated in the report of the case below. (1)

Horace Kent, for the appellant, argued substantially to the same effect as in the Divisional Court. [He cited *Hough* v. *Edwards* (2); *The Hope* (3); Chitty's Archbold's Practice, 13th ed. p. 143; *In re Suffield and Watts, Ex parte Brown* (4); *Faithfull* v. *Ewen* (5); *Shippey* v. *Grey* (6); *Birchall* v. *Pugin* (7); *Dallow* v. *Garrold.* (8)]

Smyly, Q.C., and *Crispe*, for the respondent, were not called upon.

LORD ESHER, M.R. It is unnecessary to go through all the cases cited. The case of *Faithfull* v. *Ewen* (5) in this Court undoubtedly decided what Collins, J., in the Court below, said that it decided, viz., that notice that the subject-matter of the assignment is the subject-matter of a suit amounts to notice to the assignee of the existence of the solicitor's right to a lien. Such notice prevents an assignee from being a "purchaser for value without notice." I cannot see that any of the other cases cited are to the contrary of that decision, and several of them appear to support it. As long as that decision is not overruled, it stands as the law, and it appears to me to govern the present case. Therefore the appeal must be dismissed.

KAY, L.J. I agree. When the purchaser took an assignment of the money recovered in the action, the charging order had not

(1) Ante, p. 180.
(2) 1 H. & N. 171.
(3) 8 P. D. 144.
(4) 20 Q. B. D. 693.
(5) 7 Ch. D. 495.
(6) 49 L. J. (Q.B.) 524.
(7) Law Rep. 10 C. P. 397.
(8) 13 Q. B. D. 543; 14 Q. B. D. 543.

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been made. Before the decision in *Faithfull* v. *Ewen* (1) the question thus raised might be an arguable one; but that case decides that, to defeat the assignment to the purchaser, it is not necessary that he should have notice of a charging order, but it is sufficient that he should know facts shewing that the solicitor might be entitled to a lien.

A. L. SMITH, L.J. I am of the same opinion. The case appears to me to be concluded by the previous decisions of the Court of Appeal which have been referred to.

Appeal dismissed.

Solicitor for appellant: *F. Norton.*

Solicitors for respondent: *Montagu Scott & Baker.*

E. L.

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May 23.

[IN THE COURT OF APPEAL.]

MUSURUS BEY *v.* GADBAN AND OTHERS.

Limitations, Statute of—Personal Action—International Law—Ambassador, Immunities and Privileges of—Debtor—Absence beyond Seas—Service of Writ out of the Jurisdiction—21 *Jac.* 1, *c.* 16—4 *Anne, c.* 16, *s.* 19 (*Folio Edition*, 4 *&* 5 *Anne, c.* 3)—7 *Anne, c.* 12, *s.* 3—*Rules of the Supreme Court*, 1883, *Order* XI.

The immunity of an ambassador from process in the Courts of this country extends not merely to the time during which he is accredited to the Sovereign, but to such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country, and he is not deprived of the immunity by reason that his successor is duly accredited before that period has elapsed.

While the immunity of an ambassador from process exists, it is not competent for any person to sue out a writ against him (even though it be not served) or to renew such a writ if issued, and consequently the Statute of Limitations does not begin to run against his creditors during such period.

Order XI. of the Rules of the Supreme Court which enables plaintiffs, by leave, in certain cases to serve a writ, or notice of a writ, out of the jurisdiction where the defendant is neither a British subject nor in British dominions, has not the effect of annulling the right under 4 Anne, c. 16, to bring an action against a person after his return from beyond the seas within the time limited by 21 Jac. 1, c. 16.

APPEAL from a judgment of the Queen's Bench Division, reported [1894] 1 Q. B. 533, on a special case stated under an order of the Court made by consent in an action.

(1) 7 Ch. D. 495.

The principal question was as to the right of the plaintiff, as executor of Musurus Pacha, to set up the Statute of Limitations in answer to a claim by the defendants for money lent by them to Musurus Pacha while ambassador in London, accredited by the Sultan of Turkey to and received by Her Majesty as such.

The facts on which the claim was based are stated in the judgments of the Lords Justices.

1894. May 10. *Pollard*, for the plaintiff, in support of the appeal.

Lawson Walton, Q.C., and *G. P. Macdonell*, for the defendants.

Cur. adv. vult.

1894. May 23. A. L. SMITH, L.J., read the following judgment. This is an appeal from the judgment of my brothers Lawrance and Wright (1), who held that the executor of Musurus Pacha could not set up the Statute of Limitations in answer to a claim, made against him by Messrs. Gadban & Watson, for money lent by them to his testator nearly twenty years ago, viz., in the year 1873. Musurus Pacha, for some thirty years prior to December 7, 1885, on which day he presented his letters of recall, was ambassador in London accredited by the Sultan of Turkey to and received by Her Majesty as such.

He left England two months afterwards, viz., in February, 1886, having been engaged during the interval in winding-up and handing over his official business, and settling his own affairs. He then returned to Turkey, where he resided until his death in 1890, having appointed the plaintiff his executor.

It must be taken, for the purposes of this case, that in the year 1873 Musurus Pacha, whilst ambassador in London, borrowed of Messrs. Gadban & Watson, who were then trading in partnership, the sum of 3107*l.*, and that this debt has never been paid.

After the death of Musurus Pacha his executors, in the month of November, 1891, came to this country, and engaged Mr. Gadban to collect certain bonds of the nominal value of 28,000*l.*, and other moneys belonging to the estate of his testator, and this action is brought, the writ being issued on October 12, 1892,

(1) [1894] 1 Q. B. 533.

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to recover from Mr. Gadban's executors the bonds and moneys which Mr. Gadban had collected in his lifetime pursuant to his agreement with the plaintiff.

Mr. Gadban's executors do not dispute that they are in possession of these bonds and moneys; but they assert that they are, as against the plaintiff, who as executor is suing them in this country, entitled to be paid the 3107*l.* lent in 1873, which is still unpaid; and the real point in this case is whether the debt of Musurus Pacha is or is not barred by the Statute of Limitations.

It cannot be disputed, as this debt of 3107*l.* was contracted in this country in 1873, and as the present claim to be paid it (whether raised by counter-claim or independent cross-action is immaterial) was not raised till December, 1892, that primâ facie the Statute of Limitations is an answer, for the six years would have run out in 1879; but this is an exceptional case, and it is said that, as Messrs. Gadban & Watson had no cause of action against Musurus Pacha for the money lent in 1873 before he left this country in February, 1886, for until then he was not capable of being sued in the Courts of this country, he being an ambassador thereto, and as since then he has continuously lived beyond seas, the Statute of Limitations did not begin to run until his executor took these proceedings in this country.

Mr. Pollard, who argued the case for the plaintiff, the executor of the ambassador, having strenuously urged the technical point raised in the amended special case (1), proceeded to minimise as best he could the recognised privileges and immunities of an ambassador accredited to this country.

He did not assert, for this would have been useless, that Musurus Pacha could have been effectively sued during the period he was de facto ambassador in London, for the case of *Magdalena Steam Navigation Co.* v. *Martin* (2), which has never since been doubted, settled that he could not, as during that period he was exempt from the jurisdiction of the Courts of this country.

He said, however, and in this I agree, that no case had actually

(1) So much of the judgments as related to this point has been omitted.
(2) 2 E. & E. 94.

decided that a writ could not be sued out against an ambassador, if it were not served, and he asserted that this unserved writ, as I will call it, might have been sued out prior to 1879 by Messrs. Gadban & Watson, and kept alive by renewal every six months until Musurus Pacha ceased to be ambassador and became a private gentleman in 1886; and that the Statute of Limitations began to run from the date when this unserved writ might have been sued out, which constituted a cause of action, which was long prior to six years before the making of the present claim.

He also argued, if wrong as to this, that Musurus Pacha could have been effectively sued to judgment by suing out and serving a writ upon him during the two months between December 7, 1885, and February, 1886, whilst he was making ready to leave this country, and that a cause of action arose then which was also more than six years prior to the present claim; and lastly, he said, even if wrong upon both these points, and no cause of action arose until after Musurus Pacha had left the country in February, 1886, a cause of action arose then, for Musurus Pacha, after his return to Turkey, might have been sued by Messrs. Gadban & Watson by means of the procedure which permits notice of a writ to be served upon a foreigner resident out of the jurisdiction for breach of contract to be performed within it (Order XI.), and that the cause of action therefore arose in February, 1886, which was more than six years before the present claim; so, whichever way it was taken, he said a cause of action had arisen to Messrs. Gadban & Watson more than six years before they set up their claim to the 3107*l.* in 1892, and therefore it was statute-barred.

There are three statutes applicable to this case.

The 21 Jac. 1, c. 16, s. 3, which enacts that all actions of debt shall be commenced and sued within six years after the cause of action and not after, with an exception in sect. 7 that plaintiffs if beyond seas may bring such actions within six years after their return.

The 4 & 5 Anne c. 3, s. 19 (1), which enacts that if persons are beyond seas at the time of the accrual of the cause of action against them, plaintiffs shall be at liberty to bring such actions

(1) Ruffhead, 4 Anne, c. 16.

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within six years after the defendant's return from beyond seas; and, lastly, the 7 Anne, c. 12, which by s. 3 declares that "all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, authorized and received as such by Her Majesty, her heirs or successors, may be arrested and imprisoned, or his goods and chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents constructions and purposes whatsoever."

The writs and processes mentioned in the Act are not confined to such as directly touch the person or goods of an ambassador, but extend to such as in their usual consequences would have this effect as was held in the *Magdalena Steam Navigation Co. Case* (1) above cited. This case renders it unnecessary to resort to text-writers, and to other cases prior thereto, for it lays down in clear and unambiguous language the principles upon which an ambassador is free from being impleaded in the Courts of this country.

Lord Campbell, in delivering the considered judgment of the Court of Queen's Bench, which consisted of himself, Wightman, Erle, and Crompton, JJ., used this language of an ambassador: "He does not owe even a temporary allegiance to the sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not supposed even to live within the territory of the Sovereign to whom he is accredited, and, if he has done nothing to forfeit or to waive his privilege, he is for all juridical purposes supposed still to be in his own country." These being the principles upon which an ambassador is independent of the civil jurisdiction of the country to which he is sent, in my judgment it is clearly inconsistent with them to hold that an ambassador, who has at least as great privileges of exemption from suits as the Sovereign whom he represents, can, even apart from the 7 Anne, c. 12, have a writ sued out against him commanding him in the name of Her Majesty to appear in her Courts to answer the claim of one of her subjects, even although such writ is not to be served.

Moreover, what jurisdiction is there to sue out a writ in the

(1) 2 E & E. 94.

form of a writ for service in this country against a Turk resident in Turkey, or to serve such a writ upon a Turk in Turkey? And yet this was and is the true legal position of Musurus Pacha, from the date he first became an ambassador in London till he died in Turkey in 1890.

If, however, such a writ were sued out, in my judgment it could not be renewed from six months to six months as proposed in this case, for such a renewal is only to be had when the Court or judge is satisfied that reasonable efforts have been made to serve the defendant, or for other good reason (Order VIII., r. 1.) This order clearly contemplates the case where there is a defendant capable of being sued and served when the writ is issued, but who cannot be found, or there is some other good reason for the renewal of such a writ, and it does not apply to a case like the present when there is no such defendant at all when the writ is sued out. In my opinion, when the Court or judge ascertained that the writ which they or he were asked to renew had been sued out against an ambassador accredited at the time to this country, their duty would be to refuse the application for renewal, and to hold that the writ, as in my judgment it would have been, had been improvidently issued.

I am aware that it may be said that this view may work a hardship upon a creditor of an ambassador, and that therefore there is "good reason" for granting the renewal; but in my opinion the true answer is given by Lord Campbell in the above-named case (1), that "those who cannot safely trust to the honour of an ambassador, in supplying him with what he wants, may refuse to deal with him without a surety, who may be sued; and the resource is always open of making a complaint to the government by which the ambassador is accredited."

For these reasons, in my judgment, it is not competent either to sue out a writ against an ambassador, even though it is not to be served, or to renew it, and therefore Messrs. Gadban & Watson had no cause of action against Musurus Pacha prior to December 7, 1885, when he presented his letters of recall. There is another ground which is also fatal to the contention of the plaintiff. It has been held that as on the one hand there

(1) *Magdalena Steam Navigation Co.* v. *Martin*, 2 E. & E. 94, at p. 115.

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cannot be a cause of action within the meaning of the Statute of James from which the six years will commence to run unless there be a person in existence capable of suing (*Murray* v. *East India Co.* (1)), so on the other hand there can be no such cause of action until there is somebody who can be sued: *Douglas* v. *Forrest.* (2) "Cause of action," says Best, C.J., "is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue." As Messrs. Gadban & Watson had no such person, at any rate down to December 7, 1885, the statute had not commenced to run before that date.

As to the second point, viz., that Messrs. Gadban & Watson had an effective cause of action against Musurus Pacha during the two months between December, 1885, and February, 1886, in my judgment it was decided in the *Magdalena Steam Navigation Co. Case* (3) that this is not so. It was there held that there could be no execution against an ambassador while he is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall, and that is precisely what Musurus Pacha did in the present case. During these two months Musurus Pacha was in the same position as he was in before his recall as to immunity from being sued. It was said that this was obiter. I do not think so; but, even if it be, in my judgment, considering the position of an ambassador, it is good law and sound sense. This point therefore fails the plaintiff.

I now come to consider the last point. It cannot, I think, be doubted that the Queen's Bench Division correctly held that the 4 and 5 Anne c. 3, s. 19, which suspends the running of the Statute of Limitations, if the cause of action occurred whilst the defendant was beyond seas, till he returns, is an enactment passed in favour of plaintiffs, as indeed is s. 7 of the Statute of James, though now restricted by s. 10 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97). It is in my judgment impossible to hold that a rule of practice and procedure, which Order XI. is, repeals the provisions of a statute. By the

(1) 5 B. & A. 204, at p. 214. (2) 4 Bing. 686, at p. 704.
(3) 2 E. & E. 94.

4 & 5 Anne, c. 3, s. 19, plaintiffs in the position of Messrs. Gadban & Watson are to have six years after their debtors return from beyond seas in which to prosecute their claims. If Order XI. is to be read as repealing the statute, in my judgment it must at the same time be held to be ultrà vires; but the truth is that this order does nothing of the kind. It gives the Court or a judge, in its or his discretion, power to allow service of a writ of summons, or notice of a writ out of the jurisdiction, in certain specified cases; but this rule in no way conflicts with the statute, which enacts that if a cause of action accrues against a person beyond seas the plaintiff shall have six years, within which to bring his action, after the defendant's return. The rule has nothing whatever to do with the privilege conferred by the 4 & 5 Anne upon plaintiffs. In the case of *Wilding* v. *Bean* (1) which was cited, the Court were not dealing with a case like the present, and the dictum of the Master of the Rolls, reported in 64 Law Times Reports, 41, that the plaintiff was entitled to keep the writ alive upon the chance of his eventually finding the defendant in this country, does not appear in the LAW REPORTS; but even if it did it is not applicable to the present case.

For these reasons the last point also fails the plaintiff. The Queen's Bench Division were in my judgment right when they held that the plaintiff could not set up the Statute of Limitations to the claim of Messrs. Gadban & Watson. This appeal must be dismissed with costs.

DAVEY, L.J., read the following judgment. In this action the plaintiff, who is the executor of Musurus Pacha, sues to recover from the defendants, who are the executors of Paul Gadban, certain bonds deposited with their testator and a sum of money due from them in respect thereof. The plaintiff's cause of action is admitted, and under the consent order of Kennedy, J., of February 28, 1893, the bonds and sum of money have been brought into Court "to abide further order by judge at trial of counter-claim."

The order also contains the following: "The defendants

(1) [1891] 1 Q. B. 100.

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consent also that judgment is to be entered for the plaintiff on the action for the delivery to him of the said bonds and 158*l.* 15*s.* 10*d.* and costs, but on condition that the bonds and money in Court shall be applied so far as may be necessary towards the satisfaction of such judgment (if any) as the defendants may recover in the said counter-claim." That counter-claim is for 3107*l*, moneys alleged to have been advanced by Paul Gadban and William Clarence Watson, formerly trading in co-partnership, prior to the year 1874, in defence to which the plaintiff relies on the Statute of Limitations. The principal question which has been argued before us is whether the debt claimed is barred by the statute.

The question is a curious one, and of some general interest. Not the least singular feature is that it is the representative of the ambassador who wishes to limit and minimise the privilege. I need not recapitulate the facts relating to Musurus Pacha which have been fully stated by my learned brother. On those facts Mr. Pollard contends: (1.) That to issue a writ without serving it would have been no breach of the ambassador's privilege, and that, therefore, a writ might have been issued for the purpose of saving the statute, and have been renewed from time to time.

(2.) That at any rate during the two months or more that Musurus Pacha remained in this country after his recall the writ might have been issued and served.

(3.) That after his return to Turkey the writ might have been served on him abroad under Order XI., and that, therefore, the statute began to run from at least that time, or (in other words) that Order XI. has had the effect of repealing the provisions of 4 Anne, c. 16, s. 19.

I am against the argument on each of these contentions.

With regard to the first, it is in my opinion sufficient to refer to the 3rd section of 7 Anne, c. 12, which makes all writs and processes, whereby the person of any ambassador or other public minister may be arrested or imprisoned, or his goods and chattels may be distrained, seized, or attached, utterly null and void.

It has been decided in *Magdalena Steam Navigation Co.* v.

Martin (1) that this section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law) is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in the *Magdalena Case* (1), and that all that it was necessary to decide was that that service was bad. But the grounds upon which the decision was based in Lord Campbell's judgment go beyond that point, and in my opinion shew a total want of jurisdiction of the Court to entertain the action at all. Lord Campbell, at p. 111, states the principle to be that for all juridical purposes an ambassador is supposed still to be in his own country, and he concluded his judgment in these words: "It certainly has not hitherto been expressly decided that a public minister duly accredited to the Queen by a foreign State is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles." These passages, in my opinion, correctly state the legal principles on which the exemption is founded, and are in accordance with the course of decisions in our Courts: see, for example, the latest case of *The Parlement Belge* (2) in the Court of Appeal, in which it was said (I am reading from the marginal note, which is fully borne out by the judgment) that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action which action the Court has no jurisdiction to entertain,

(1) 2 E. & E. 94. (2) 5 P. D. 197.

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and which writ, therefore, the Court has no jurisdiction to issue, can prevent the statute running.

I agree with and will not repeat what has been said by my learned brother on the practical difficulty of supposing that the leave of the Court would be given to the renewal of such a writ.

I am therefore of opinion that Gadban & Watson, or Gadban or his executors, could not have properly issued a writ against Musurus Pacha or (in other words) had no right of action against him while he was ambassador. The doubts suggested in *Taylor* v. *Best* (1) cannot in my opinion be supported.

The answer to the next point, that the writ might have been served on Musurus Pacha while he was still in this country, is given by Wright, J., and in addition to the authority cited by him I may refer to Lord Campbell's judgment in the *Magdalena Case* (2), in which he says of such a writ (p. 114): "There can be no execution upon it while the ambassador is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall." Paragraph 2 of the reply avers that "Musurus Pacha remained in England only for the purpose of making the necessary preparations for his departure, and no longer than was necessary for the purpose." Nothing to the contrary is stated in the special case, and there is nothing from which we can infer that he stayed longer than a reasonable time. I am therefore of opinion that the privilege continued until his return to Turkey, as it appears to me it would be almost an outrage on common sense to say that the privilege ceases the moment he has presented his letter of recall. In handing over the affairs of the embassy to his successor the ex-ambassador is still engaged on his sovereign's business, and must have a reasonable time allowed for that purpose. The last point is one of some novelty and, if I may be permitted to say so, of some boldness. In the first place, Order XI. does not purport to repeal the Statutes of Limitation, or any of them, or say anything about them. If repeal there be, therefore, it is not by express words, but must be implied from the inconsistency of the provisions of the order with the provisions of the statute in question.

(1) 14 C. B. 487. (2) 2 E. & E. 94.

This must, in order to effect a repeal, be a necessary implication. Now, I do not see any necessity in the case. Order XI. provides a means by which litigants may, in certain cases, with the leave of the Court, serve a writ upon a defendant out of the jurisdiction. The statute of 4 Anne, c. 16, s. 19, in effect provides that the Statute of Limitations shall not run against a defendant who is beyond the sea. Where is the inconsistency? A plaintiff has the alternative right. He may either apply for leave to serve the writ abroad, or he may wait till his defendant comes within the jurisdiction. I ought, however, to add, that I should hesitate some time before I expressed any opinion, that the judges under a power to make rules relating to the practice and procedure of the Courts could repeal the Statutes of Limitations, although they are no doubt part of the lex fori. Could they, for example, say that the time for recovery of debts shall be for five years instead of six? It is unnecessary, however, to say more about this, as in my opinion the point does not arise.

I am, therefore, of opinion that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Busk & Mellor.*

Solicitors for defendants: *Austin & Austin.*

A. M.

SMITH, APPELLANT *v.* MASON & CO., RESPONDENTS.

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May 30.

Revenue—Stamp—Medicine—"Held out or recommended to the Public"—"Public Notice or Advertisement"—Stamp Act, 1804 (44 *Geo.* 3. *c.* 98), *Schedule B—Medicines Stamp Act,* 1812 (52 *Geo.* 3, *c.* 150), *ss.* 1, 2, *and Schedule.*

By the Medicines Stamp Act, 1812, s. 2, a penalty is imposed on any person who shall utter, vend, or expose to sale, any packet, &c., containing any of the drugs, &c., mentioned in the schedule, without a paper cover, duly stamped, denoting the duty charged.

The schedule includes all powders, tinctures, &c., to be used or applied as medicines for the prevention, cure, or relief of any disorder or complaint, incident to or affecting the human body, which are, by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, &c., containing the same, held out or recommended to the public by the makers, venders, or proprietors, as nostrums or proprietary medicines, or as specifics, or as beneficial

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to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint, incident to or affecting the human body.

The special exemptions in the schedule include all medicinal drugs which shall be uttered or vended entire, without any mixture or composition with any other drug or ingredient, by any surgeon, apothecary, chemist, or druggist who hath served a regular apprenticeship, or by any other person licensed.

Informations were preferred against the respondents, a limited company, for selling a powder and a tincture without stamps.

The respondents issued a price-list, which was distributed gratis, and described the medicines as beneficial for certain specified ailments, and the bottle of tincture was wrapped in a handbill describing it in terms similar to those in the price-list:—

Held, that, by distributing the price-list, the respondents had held out or recommended the medicines to the public, by a public notice or advertisement, as beneficial for the cure of disorders, within the meaning of the schedule, that it was not necessary that the notice or advertisement should be affixed to or delivered with the medicine, that the case did not come within the special exemptions, that the stamp duty was payable, and that the informations ought not to be dismissed.

CASE stated by justices.

The respondent company appeared to answer two informations exhibited by the appellant, an officer of inland revenue, prosecuting by order of the Commissioners of Inland Revenue.

One of the informations stated that the respondents did utter, vend, and expose to sale, a packet containing a certain preparation and composition, to be used and applied as a medicine and medicament for the prevention, cure, and relief of disorders and complaints incident to and affecting the human body, and liable to stamp duty chargeable in respect of medicines under the statutes, to wit, Dr. Gregory's Stomachic Powder, without a paper cover, wrapper, and label, provided by the Commissioners of Inland Revenue, pursuant to the statute, and duly stamped, for denoting the duty charged on such packet, being properly and sufficiently pasted, stuck, fastened, and affixed thereto, contrary to the form of the statute, whereby, and by force of the statute, the respondents had for such offence forfeited the sum of 10*l.* (1)

(1) The following are the material statutes: The stamp duties payable in respect of medicines are charged by Schedule B to the Stamp Act, 1804 (44 Geo. 3, c. 98), and s. 1 of the Medicines Stamp Act, 1812 (52 Geo. 3, c. 150). Sect. 2 of the latter Act imposes a penalty of 10*l.* on any person who "shall utter, vend, or expose to sale, or offer or keep ready for sale, . . . or buy, or receive, or keep for the purpose of selling by retail, . . . any packet,

The second information was in similar terms, except that it had reference to a medicine called Tincture of Nux Vomica.

The following facts were stated in the case:—

The respondent company was a registered company under the Companies Acts, 1862 to 1890, and carried on the business of a chemist and druggist and vender of medicines at Durham and other places.

The respondent company sold to Thomas Jameson, at their shop in Durham, at the price of 6*d.* each, one bottle of Dr. Gregory's Stomachic Powder, and, in a cylindrical cardboard box, one bottle of tincture of Nux Vomica, and there was not any stamp affixed to either of the bottles or box.

Previously to purchasing the medicines Jameson had received from the respondent company at their shop a book, being the respondents' Cash Price List, 1893, which was distributed gratis by them, and was descriptive of medicines and other commodities

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box, bottle, pot, phial, or other inclosure containing any of the drugs, herbs, oils, waters, essences, tinctures, pills, powders, preparations, or compositions mentioned and set forth in the schedule annexed to this Act" without a paper cover, provided by the Commissioners of Inland Revenue, duly stamped for denoting the duty charged.

The schedule to the Act, after setting out a long list of medicines of different kinds, continues as follows: "And also all other pills, powders, lozenges, tinctures, potions, cordials, electuaries, plaisters, unguents, salves, ointments, drops, lotions, oils, spirits, medicated herbs and waters, chemical and officinal preparations whatsoever, to be used or applied, externally or internally, as medicines or medicaments for the prevention, cure, or relief, of any disorder or complaint incident to, or in anywise affecting, the human body, uttered, vended or exposed for sale," &c. . . . which are, "by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, box, bottle, phial, or other inclosure containing the same, held out or recommended to the public by the makers, venders, or proprietors thereof, as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder or complaint incident to or in anywise affecting the human body."

The schedule specifies, under the head of "Special Exemptions," "all medicinal drugs whatsoever which shall be uttered or vended entire, without any mixture or composition with any other drug or ingredient whatsoever, by any surgeon, apothecary, chemist, or druggist, who hath served a regular apprenticeship, . . . or by any other person whatsoever licensed to sell any of the medicines chargeable with a stamp duty."

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sold by the respondent company, and which they offered for sale and were prepared to sell. The book contained on the cover an index of contents and the words following:—

"Mason & Co.'s (Limited) Cash Price List 1893. Prescriptions dispensed by qualified chemists" (followed by a statement of the respondents' various addresses).

Page 10 of the book contained a notice of Dr. Gregory's Stomachic Powder, in the following terms: "Dr. Gregory's Stomachic Powder, composed of the finest Turkey Rhubarb, Calcined Magnesia, Jamaica Ginger, for acidity, flatulence, loss of appetite, and the symptoms attending on impaired digestion. Its properties are anti-acid and gently aperient. It is well adapted for gouty and dyspeptic invalids, and may be taken under any circumstances. Price 3½*d.* and 6*d.* per bottle."

The label affixed to and delivered with the bottle of Dr. Gregory's Stomachic Powder sold to Jameson was in the following terms:—

"Dr. Gregory's Stomachic Powder. Prepared from the original receipt of the late Dr. Gregory of Edinburgh. Composed of the finest Turkey Rhubarb, Calcined Magnesia, and Jamaica Ginger. The dose for an adult is one or two large teaspoonfuls, taken either at bedtime or early in the morning, in a glassful of common or peppermint water" (with a statement of the respondents' addresses).

Page 33 was headed: "Mason & Co.'s (Ld.) Patent Medicine List." In the first column the list of homœopathic medicines commenced, from which the following was an extract:—

"Homœopathic medicines. The following tinctures and pills are kept in stock. They are prepared by duly qualified homœopathic chemists, and the utmost and most scrupulous care is taken in their manufacture. . . . The 1*s.* sizes are sold at 6*d.*, or 6 for 2*s.* 9*d.* The medicines can be sent by post for 1*d.* per bottle extra. Uses of the principal medicines: . . . Nux Vomica —Derangements of the Stomach, Spasms, Heartburn, Constipation, Piles."

The bottle of tincture of Nux Vomica was enclosed in a cardboard case, in which was a handbill, wrapped round the bottle containing the tincture, in the following terms:—

"Barker & Barker, Manufacturers of Homœopathic Medicines, Wholesale and Retail, 26 High Holborn, London.

"In the selection and preparation of all remedies great care is taken to use only that particular form of drug which has been the subject of original provings. Uses" (as in the Patent Medicine List); and affixed to the bottle, and on the outside of the cardboard box, were labels stating the amounts of doses, and that the tincture was prepared by Barker & Barker, and on the top of the box was pasted a small circular label with the names of the tincture, and of the makers, Barker & Barker.

The contents of the bottle of Dr. Gregory's Powder was the medicinal powder or preparation well known and regularly sold by the name of Dr. Gregory's Stomachic Powder, and answered to the description given in the notice on page 10 of the book, and was the article so noticed. The contents of the bottle of Nux Vomica was homœopathic tincture of Nux Vomica, and was the Nux Vomica referred to in the book, and in the handbill wrapped round the bottle. Both the powder and the tincture of Nux Vomica were used and intended to be used for the purposes described in the respondents' book.

The homœopathic tincture of Nux Vomica was the same as the tincture of Nux Vomica in the British Pharmacopœia, except that the homœopathic tincture was weaker.

No evidence was called for the respondents.

The respondents had not paid any duty in respect of either of the articles, and both were sold without the paper cover, wrapper, or label, provided and supplied by the Commissioners of Inland Revenue, and duly stamped, described in s. 2 of the Medicines Stamp Act, 1812.

It was contended on behalf of the appellant that the respondents had contravened s. 2 of the Medicines Stamp Act, 1812, and that the articles should not have been sold by the respondents without the duly stamped paper cover, wrapper, or label, pasted, stuck, or affixed to the bottles and cardboard box, as described and required by that section.

The respondents contended that they were within the special exemptions in the schedule to the Act of 1812, and that, even if they were not so, they had not contravened s. 2.

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The justices held that the facts and circumstances stated disclosed no evidence of any offence against s. 2 of the Medicines Stamp Act, 1812, and dismissed both informations.

The question for the opinion of the Court was, whether the justices were right in point of law in dismissing the informations.

Danckwerts, for the appellant. The magistrates were wrong in dismissing the informations. In both cases the effect of the respondents' price list is to hold out or recommend to the public the medicines in question as specifics, or as beneficial to the prevention, cure, or relief, of ailments, &c., incident to or affecting the human body, within the meaning of the schedule to the Medicines Stamp Act, 1812, and both cases come within the Acts imposing the stamp duties, and within s. 2 of the Act of 1812, which imposes the penalty. As to the tincture of Nux Vomica, the wrapper round the bottle also brings it within the statute. Neither medicine comes within the words of the special exemptions, and no evidence was given of a sale by any qualified chemist, or of the existence of any licence which could justify the respondents in selling. If the defence was that the respondents were protected by the special exemptions, this ought to have been proved in accordance with the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39, sub-s. 2, and no evidence was given.

T. Willes Chitty, for the respondents. Neither of these preparations comes within the meaning of the statutes. The label does not hold out or recommend the medicine as a specific, but only describes the nature of the preparation. The price list is not a "public notice or advertisement," nor is it "affixed to or delivered with any packet," &c. In order to bring the price-list within the words of the schedule, the medicine should have been "held out or recommended to the public by the makers, venders, or proprietors thereof." This means, by the makers, or the original or first venders, which the respondents clearly were not. The facts stated in the case are sufficient to bring both preparations within the special exemptions. The price-list states that the prescriptions are dispensed by duly qualified chemists. There is no evidence to the contrary, and therefore

the special exemptions apply; but if there is any doubt as to this, the case ought to be remitted for the justices, to find as a fact, whether the persons employed by the respondents to sell were duly licensed or not.

CAVE, J. I am of opinion that this appeal must be allowed, and the case remitted to the magistrates with an intimation of our opinion that they ought not to have dismissed the informations on the ground which they appear to have taken. The respondents contended that they were within the special exemptions of the schedule to the Act of 1812, and that, even if they were not, they had not contravened s. 2. The justices held, that the facts disclosed no evidence of any offence against s. 2, and dismissed both informations. I am of opinion that the magistrates were wrong in taking that course. Take first the case of Dr. Gregory's Powder. The Act of 1812, by the schedule, brings within its scope all powders to be used internally as medicines, which shall be, by any public notice or advertisement, held out or recommended to the public, by the venders thereof, as beneficial to the relief of any complaint. Gregory's Powder is a powder to be used internally as a medicine, and it was, by a public notice or advertisement, held out or recommended to the public, by the venders, as beneficial for the relief of many complaints.

It was contended on behalf of the respondents, first, that there was no public notice or advertisement, and, secondly, that to bring the case within the Act, the notice or advertisement ought to have been affixed to or delivered with the medicine. But, on looking at page 10 of the respondents' price list, which is annexed to the case, I find the following statement: "Dr. Gregory's Stomachic Powder, composed of the finest Turkey Rhubarb, Calcined Magnesia, Jamaica Ginger, for acidity, flatulence, loss of appetite, and the symptoms attending on impaired digestion." If this statement were inserted in a newspaper, it would clearly be an advertisement or notice, and it does not matter whether the statement is inserted in a newspaper for which one would pay a penny, or in a price list which is distributed gratis to the public. It is as much a public notice

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Cave, J.

or advertisement in the one case as in the other. I am of opinion that the words "affixed to or delivered with any packet," &c., in the schedule to the Medicines Stamp Act, 1812, do not apply to the words "public notice or advertisement." I am inclined to think that they apply to the words "label, or words written or printed"; but in any case they do not apply to "public notice or advertisement;" and, when once the powder is recommended to the public as beneficial by a public notice or advertisement, the case is brought within the Act.

Then, as to the second point taken: it is contended that the respondents come within the exemption, under the heading of "Special Exemptions," in the schedule to the Act of 1812; but, when the exemption is read, we find that it is in these terms: "All medicinal drugs whatsoever which shall be uttered or vended entire, without any mixture or composition whatsoever, by any surgeon, apothecary, chemist or druggist, who hath served a regular apprenticeship, ... or by any other person whatsoever licensed to sell any of the medicines chargeable with a stamp duty, &c." The exemption, therefore, is confined to persons who have served a regular apprenticeship, or are duly licensed to sell medicines chargeable with a stamp duty; and it does not apply to persons who do not come within that description. For these reasons, I am of opinion that the special proviso does not apply, and that there is a good primâ facie case against the respondents, so far as relates to Gregory's Powder.

With regard to the tincture of Nux Vomica, I am of the same opinion. It comes within the words "all other pills, powders, lozenges, tinctures," &c., in the schedule to the Medicines Stamp Act, 1812. There is a printed paper attached to the case, the effect of which is to hold out or recommend to the public tincture of Nux Vomica as beneficial for the prevention, cure, or relief, of disorders or complaints affecting the human body. There is no necessity to discuss the question, whether it is necessary that the paper should be delivered with the bottle, because in point of fact this paper was delivered with the bottle containing the tincture, and there is therefore a printed paper delivered with the bottle holding out or recommending the tincture to the public, within the meaning of the schedule. It is, however, contended, with

regard to this part of the case also, that the respondents come within the special exemption to which I have already referred. But, in the first place, the exemption is "all medicinal drugs uttered or vended entire without any mixture or composition with any other drug or ingredient." No doubt Nux Vomica is a medicinal drug; but it is not vended entire, without any mixture or composition with any other drug or ingredient, because it is mixed with, or dissolved in, spirits of wine, and is sold as a tincture, and the word "tinctures" is in the schedule to the Act. Moreover, there is no proof of any licence, which would justify the respondents in selling these medicines chargeable with the stamp duty.

For these reasons I am of opinion that the case must go back to the magistrates with the intimation of our opinion to the effect which I have stated.

COLLINS, J. I am of the same opinion, and on the same grounds.

Case remitted.

Solicitor for appellant: *The Solicitor to the Board of Inland Revenue.*

Solicitors for respondents: *Crossman & Prichard, for Oliver, Durham.*

P. B. H.

C. A.

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Feb. 26.

[IN THE COURT OF APPEAL.]

HOYLE & JACKSON AND OTHERS, APPELLANTS; THE ASSESSMENT COMMITTEE FOR THE POOR LAW UNION OF OLDHAM IN THE COUNTY OF LANCASTER, AND THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF THE TOWNSHIP OF OLDHAM, RESPONDENTS.

Poor-rate—Assessment of Cotton Mills—Stoppage of Works through a Strike—Possibility of estimating duration of Strike—Occupation of Mills during Stoppage.

Two days before the making of an assessment for the relief of the poor on certain cotton mills of the appellants, in conformity with the valuation list then in force, a strike occurred which caused the stoppage of the mills. During the strike the mills were occupied by the appellants' servants for the purpose of keeping the machinery in order. The appellants objected to the valuation list. When the objections were heard by the assessment committee, who declined to amend the list, the strike, which had lasted several months, had ended. On a case stated on an appeal to Quarter Sessions:—

Held (affirming the decision of a Divisional Court), that the assessment was valid, as the assessment committee were not bound to take into consideration the particular strike, and it did not appear that they had disregarded the general contingency of strikes:

Held also, that the assessment, having been properly made, could not be subsequently reduced by treating the mills as warehouses, for storing machinery only, during the stoppage of work.

Staley v. *Overseers of Castleton* (5 B. & S. 505) distinguished.

SPECIAL case stated by order of a judge under 12 & 13 Vict. c. 45, s. 11.

The appellants were the occupiers of certain cotton mills or factories, and were rated in respect of them in an assessment for the relief of the poor of the township of Oldham, made and allowed on November 7, 1892, in conformity with the valuation list then in force. The appellants had given notice of objection against the said valuation list to the respondents, but, at the hearing on June 12, 1893, failed to obtain such relief as they deemed just, and gave notice to the respondent of their intention to appeal at the next quarter sessions against the rate or assessment, the particular grounds of appeal being: (1.) That the appellants were over-assessed in respect of the yearly value of

their mills or factories. (2.) That the assessments were not made upon an estimate of the rents at which the mills and factories might reasonably be expected to let from year to year, free from all tenants' rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of repairs, insurance and other expenses necessary to maintain the mills and factories in a state to command such respective rents. (3.) That in assessing the mills and factories no account had been taken of, and no allowance or deduction had been made for, the possibility or probability of the stoppage of the mills and factories in consequence of strikes, lock-outs, or bad trade. (4.) That the mills and factories were not working from November 7, 1892, to March 25, 1893, and were assessable during that period as warehousing only for machinery, and not as going or working concerns. (5.) That the valuation list and rate were unequal, unfair, and incorrect in the several hereditaments included therein.

The mills or factories were, at the time of the making of the rate or assessment and at the date of the case, furnished with steam engines, steam boilers, and the requisite machinery for the purpose of spinning and manufacturing cotton, and steam-pipes from the boilers were carried through all the rooms for the purpose of heating them and keeping the machinery in working order.

In or about October, 1892, a dispute arose in the cotton-spinning trade between the employers and their workpeople as to the rate of wages, and in consequence of that dispute the mills of the appellants ceased to work on November 5, 1892, and did not resume work until March 27, 1893, but during the period of stoppage the rooms of each mill or factory, and the machinery therein, were kept warm by steam and in good working order and condition.

The mills and factories were assessed according to their respective values, as shewn by the valuation list then in force, without regard to the fact that they were not then, nor until March 27, 1893, in full work and operation, and were occupied only for the purposes above mentioned.

It was admitted that the mills or factories were not working

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from November 5, 1892, until March 27, 1893, and also that, assuming there had not been, and would not be, any stoppage, the respective assessments of the mills or factories were fair and reasonable.

The appellants contended that the mills or factories were assessable during the period of stoppage as warehousing for storing machinery only, and not as going or working concerns, and that the nature of their occupation had changed from a working to a non-working occupation; and further, that in assessing them the respondents ought to have taken into account and made some allowance or deduction in respect of the possibility or probability of the stoppage thereof in consequence of strikes, lock-outs, or bad trade.

The respondents contended that assessments to the poor-rate should be made upon the basis of the yearly letting value of the premises to a tenant from year to year, and not upon the basis of the variable letting values during several portions of a year; that it was not their duty to make any reduction in the assessments, or any allowance or deduction from the rate, by reason of a temporary stoppage of the mills or factories, and that they could not, at the date of the objection made to them, reduce the assessments of the mills or factories to their respective values as warehouses for machinery, as they were then in full work and operation.

The questions for the opinion of the Court were:—

1. Whether, under the circumstances stated in the case, the appellants were entitled to have the assessments of their mills or factories reduced in respect of the said stoppage of work, and to have the mills or factories assessed as warehouses for storing machinery only during the period of stoppage.

2. Whether, under the circumstances, the respondents had, on June 12, 1893, or had at the date of the adjournment of the case, any power to make such a reduction.

Marshall, Q.C. (*Montague Lush*, with him), for the appellants. The principle upon which the appellants have been assessed is wrong. What is to be looked at is the state of things actually existing at the time when the rate is made: *Reg.* v. *Grand Junc-*

tion Ry. Co. (1), per Lord Denman, C.J.; *Metropolitan Board of Works* v. *West Ham* (2), per Lush, J. In the present case there was at that time a strike existing among the appellants' work-people, the effect of which was that the nature of the appellants' occupation of their mill was changed during the whole period of the strike; their occupation was no longer effective or beneficial, and they are entitled to an allowance in respect of that period.

[LAWRANCE, J. Your contention would make profits the basis of the rate. The case is very like that of a farmer whose crops are washed away by the rain, and who cannot pay his rent; but that does not affect his rateability.]

The same principle does not apply; for here the mills were closed during the strike, and effective occupation was wholly impossible.

Under these circumstances the appellants are entitled to an allowance in respect of the particular period covered by the strike. Such a strike is obviously a fact which an intending tenant would take into consideration in determining the rent he would give for the mills, and it should have been taken into consideration in determining the rent which a hypothetical tenant would give. That not having been done, the appellants are entitled to be rated for the period covered by the strike upon the annual value of the mills as storehouses for the machinery in them, and not upon their estimated rental value as mills: *Staley* v. *Overseers of Castleton* (3); *Harter* v. *Salford.* (4)

[He also cited *Mildmay* v. *Wimbledon* (5); *Reg.* v. *Westbrook* (6); *Reg.* v. *Malden.* (7)]

Macmorran, (*F. H. Mellor*, with him), for the respondents. It it admitted that in ascertaining the rent which the hypothetical tenant would give all the contingencies of trade should be taken into consideration; the hypothetical tenant would consider the general contingency of strikes, and there is nothing to shew that this general contingency was not taken into consideration in

(1) 4 Q. B. 18, at p. 35.
(2) Law Rep. 6 Q. B. 193, at p. 198.
(3) 5 B. & S. 505.
(4) 6 B. & S. 591.
(5) 41 L. J. (M.C.) 133.
(6) 10 Q. B. 178.
(7) Law Rep. 4 Q. B. 326.

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arriving at this assessment. But this is wholly different from taking into consideration the existence during the year of a particular strike, for that would be to substitute profit for rental value as the criterion to determine the amount of the assessment, which would be an erroneous principle: see per Lord Herschell, L.C., in *West Ham* v. *London County Council.* (1) The rent which the hypothetical tenant would give having once been fixed, it cannot be affected by temporary causes, such as the occurrence of a strike during the year; the argument for the appellants would apply equally to the breakdown of machinery or to any other matter affecting the value of the business. The cases cited as authorities for rating these mills merely as storehouses for machinery are inapplicable; in *Staley* v. *Overseers of Castleton* (2) the mills had ceased to be of any value as mills; the alteration in value was permanent, for the business was at a standstill, and no one could tell when the war would come to an end; while in *Harter* v. *Salford* (3) the tenant himself had altered the nature of his occupation by shutting up his mill and giving up business with the intention of never resuming it.

[He referred to *Smith* v. *Overseers of Birmingham.* (4)]

Marshall, Q.C., in reply.

DAY, J. I am clearly of opinion that our answer to both the questions asked us should be in the negative. The present case looks very like an attempt to disturb very well-settled principles of rating. The rating of a hereditament is to be on its rental value, and the rental value is the rent which a hypothetical tenant may reasonably be expected to give as a tenant from year to year. It is said that the assessing tribunal ought to take into consideration the particular unfavourable circumstances affecting a hereditament during the year; but that is not the law; the value is what the hypothetical tenant would give at the time of the assessment. In the present case the tenant was in constant and continuous, and in a certain sense beneficial, occupation during the whole time, though he was not during the whole time using the premises as a mill, and I can see no reason

(1) [1893] A. C. 562, at p. 591.
(2) 5 B. & S. 505.
(3) 6 B. & S. 591.
(4) 22 Q. B. D. 703.

for saying that he was entitled to any such deduction as that claimed.

LAWRANCE, J. I am of the same opinion. The whole question seems to be whether the tenants of these mills were or were not in occupation during the period for which the rate was made. That bodily they were in occupation is undeniable; and are we to say that because of the occurrence of a strike or of a period of bad trade which renders a tenant unable to conduct his business in the same way that he did previously, he is entitled to say that he is not in occupation in the same sense in which he was before the occurrence of the strike or the bad trade? I think not; and in my opinion the appellants were, in the proper sense of the term, in occupation of these mills during this period. It is true that they were not working the mills, but they were ready to recommence working them at any moment. The circumstances in the present case are different from those which existed in *Staley* v. *Overseers of Castleton* (1) and *Harter* v. *Salford* (2), for in those cases the business had actually ceased, and the buildings had been turned from mills into warehouses for machinery, and as far as the ability of the tenants to carry on business was concerned, they were in no better position than if their mills had been burned down. Here, however, we have only the case of a mill assessed at the rent which a hypothetical tenant would give, and the occurrence of a strike among the workpeople; the fact that this strike did occur is one which in my opinion cannot in these proceedings be considered. The contingency of a strike is one which, in the present times, must have entered the minds both of a hypothetical tenant and of the real tenant, and I feel little doubt that it entered the minds of the assessment committee as well.

Judgment for the respondents.

W. J. B.

The appellants appealed to the Court of Appeal.

Marshall, Q.C., and *Montague Lush*, for the appellants. The facts shew that the mills were improperly assessed as going

(1) 5 B. & S. 505. (2) 6 B. & S. 591.

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concerns. When the objections were heard by the assessment committee the strike was over, and the committee had before them the materials for correcting the assessment. While the strike lasted there was a complete alteration of the mode of occupation, and the mills could only be treated as warehouses for the machinery: *Staley* v. *Overseers of Castleton* (1); and the committee should have made a reduction in respect of the stoppage of work during the strike.

A. Macmorran, and *F. H. Mellor*, for the respondents, were not called on.

LORD ESHER, M.R. It seems to me a plainer case never could be. It is admitted by everybody that what the assessment committee had to do was to assess the occupiers of this mill in respect of their occupation for the coming year, and they had to say what at that moment in their judgment an hypothetical tenant from year to year would give as rent for those premises, after making allowance for the parliamentary deductions.

Now, the mill up to that time, as far as this case is concerned, had been a fully working cotton mill; but two days before the assessment there was a strike, and the workmen left the place. It is said that the assessment committee were bound to suppose that an hypothetical tenant would have taken that into account, and thereupon would have refused to give the same rent that had been paid for the mill up to that time; and that the assessment committee ought to have taken that into account and diminished the amount of the assessment on that ground; and that they ought to have diminished it on the ground that the strike would possibly or probably last for a time so as to affect the views of the hypothetical tenant. It seems to me that it is absurd to say that the assessment committee could appreciate that probability. As to the possibility, it is unnecessary to say anything; but how could they appreciate the probability in the circumstances of this particular case, in which the strike had only lasted two days, and might terminate at any moment? What is there to make it a tangible probability? How do we know what view they took of the facts? There is nothing to shew that they did not

(1) 5 B. & S. 505.

assess the property at that time in the ordinary way, and according to the ordinary rule. The second point seems to me to be worse than the first. The second point is this: Assuming the assessment to have been rightly made; assuming the occupier to have been rated at the proper sum, and that after he had been so rated, and in the course of the year the workmen strike and leave the mill. But the occupiers did not give up occupation of the mill; they occupied with some servants, who were keeping the machinery in order. Then it is said that the overseers, who admittedly cannot alter the amount of the rate, are to say, "This mill was being used as a warehouse during this time"—which was not the fact—and upon that they are to make an allowance or deduction from the rate to be collected. There is no authority for such a proposition as that. The case which has been cited has nothing to do with the facts of this case. Therefore I think the Divisional Court was right, and this appeal must be dismissed.

LOPES, L.J. I have nothing to add.

DAVEY, L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Chester, Mayhew, Broome & Griffiths, for Hesketh Booth, Oldham.*

Solicitors for respondents: *Maudes & Tunnicliffe, for J. W. Mellor, Oldham.*

A. M.

1894, June 1.

FREEMAN *v.* GENERAL PUBLISHING COMPANY, LIMITED.

Company—Voluntary Winding-up—Stay of Proceedings in Action—Costs—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 85—*Judicature Act,* 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

Where an order is made staying an action brought against a company which is being voluntarily wound up, the Court or judge has power in a proper case to order the plaintiff to pay the costs of the application.

APPEAL from a decision of Lawrance, J., at chambers, affirming an order of a master staying all proceedings in the action.

The action was brought to recover the price of goods sold and delivered to the defendant company. On August 24, 1892, after the goods had been supplied, a resolution to wind up the company voluntarily was passed, of which resolution the plaintiff was aware. Upon September 19, 1892, the writ in the action was issued, and was served upon the defendants; and on the same day a letter was written to the plaintiff by the liquidator's solicitors informing the plaintiff that there was no objection to his proving in the winding-up for the amount of the debt. A long correspondence ensued, and on December 5, 1892, an appearance was entered at the request of the plaintiff's solicitors; and on December 15, 1892, the summons to stay all proceedings in the action was taken out by the defendants. After repeated adjournments an order was made by the master on April 20, 1894, by which all proceedings were stayed and the plaintiff was ordered to pay the costs of the application. The order having been affirmed by the judge, the plaintiff appealed.

The principal matter argued on the appeal was whether the order to stay was rightly made, it being contended on behalf of the plaintiff that the letter of September 19, 1892, did not amount to an admission of the debt, and that the order was therefore wrong. The Court, however, were clearly of opinion upon the affidavits that, assuming the letter to have been couched in somewhat equivocal terms, it had been treated by both parties as a complete admission of the whole of the plaintiff's claim, and that the proceedings were therefore rightly

stayed. The case is therefore reported only so far as it related to the power of the master to order the plaintiff to pay the costs.

Cranstoun, for the plaintiff. There was no jurisdiction to make the plaintiff pay the costs, although the master might have refused to allow the plaintiff to add to his debt the amount of his costs and prove for the whole sum, following the decision in *Rose* v. *Gardden Lodge Coal Co.* (1) And upon a similar application in *In re Peninsular Banking Co.* (2), Lord Romilly, M.R., expressly said: "I cannot make him pay costs."

[COLLINS, J. There was no suggestion in that case that the plaintiff had notice of the winding-up.]

T. Willes Chitty (*Carson, Q.C.*, with him), for the defendants. In *Rose* v. *Gardden Lodge Coal Co.* (1), as is apparent from the judgment, the Court assumed that they had the power to order the plaintiff to pay the costs, though they refrained from exercising it. In any event, there is power under s. 5 of the Judicature Act, 1890 (3), to make the order as to costs.

CAVE, J. [After delivering judgment dismissing the appeal against the stay of proceedings, the learned judge proceeded:—] It is contended that there was no jurisdiction to order the plaintiff to pay the costs of the application. To this contention there is a two-fold answer. In the first place, I am not satisfied that, apart from recent legislation, there was no jurisdiction to make that order. In *Rose* v. *Gardden Lodge Coal Co.* (1) the Court seem to have entertained no doubt as to their power to make the plaintiff pay the costs, though they did not exercise it in the particular case. But whether that is so or not, the power unquestionably is given under s. 5 of the Judicature Act, 1890, which enables the Court or judge with certain exceptions, of

(1) 3 Q. B. D. 235.

(2) 35 Beav. 280.

(3) By 53 & 54 Vict. c. 44, s. 5, "Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

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which this case is not one, to exercise a discretionary jurisdiction over the costs of all applications. If there was jurisdiction to give costs, and if the order to stay the action was rightly made (as I have already said it was), we have no jurisdiction to alter the decision as to costs, which was in the discretion of the judge at chambers, whose discretion, in the absence of leave to appeal, we cannot review.

COLLINS, J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Keene, Marsland, & Bryden.*
Solicitors for defendants: *Learoyd, James, & Mellor.*

W. J. B.

1894
May 28.

THE QUEEN *v.* JONES AND ANOTHER.

Habeas Corpus—Costs—Jurisdiction to order Payment—Supreme Court of Judicature Act, 1890 (53 & 54 *Vict. c.* 44), *ss.* 4, 5.

Since the commencement of the Supreme Court of Judicature Act, 1890, the Court, when granting an application for a habeas corpus, has jurisdiction, by s. 5 of that Act, to order payment by the defendant of the costs of the application, and such jurisdiction is not affected by the provisions of s. 4.

AN order nisi had been granted for a habeas corpus, to compel the defendants, who were doctors connected with an asylum, to give up to the applicant the custody of a lunatic patient. The case had come on for argument before Cave and Wright, JJ., on a former day, when it appeared that the defendants were willing to comply with the application, and the Court directed that the order for a habeas corpus should be made absolute unless within a certain time the custody was given up.

Counsel for the applicant asked for an order that the defendants should pay to the applicant the costs of the application. The Court were of opinion that, under the circumstances, the case was one in which payment of costs ought to be ordered, if there was jurisdiction to make such an order; but a doubt being suggested as to the existence of such jurisdiction, it was directed that the case should be put in the list again, and the case was

now called on for argument before Cave and Collins, JJ., on the question as to jurisdiction to order payment of costs. (1)

May 28. *English Harrison*, for the defendants, was called on. The question of jurisdiction to order payment of costs depends on the effect of ss. 4 and 5 of the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44). Before that Act there was no such jurisdiction, for there was no statute conferring it: *Dodd's Case.* (2) The Rules of the Supreme Court, 1883, Order LXV., r. 1, and Order LXVIII., r. 2, did not give any new jurisdiction to award costs: *In re Mills' Estate, Ex parte Commissioners of Works and Public Buildings.* (3) The Act of 1890 does not enlarge the jurisdiction to give costs. Its effect is merely to repeat the provisions of the rules already referred to in a statutory form. If s. 5 standing alone could confer any new jurisdiction its effect, so far as the present case is concerned, is neutralized by s. 4: *London County Council* v. *Churchwardens and Overseers of West Ham.* (4) This is a case on the Crown side of the Queen's Bench Division, and there is no jurisdiction to give costs. *Reg.* v. *Justices of the County of London and London County Council* (5) was a case of prohibition, and the reasoning of that case does not apply to this. [He also referred to *Reg.* v. *Jackson.* (6)]

H. Terrell, for the applicant, was not heard.

CAVE, J. I have come to the conclusion that we have jurisdiction in this case to grant costs to the applicant for an order for a habeas corpus, and that those costs ought to be granted.

(1) By the Supreme Court of Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 4: "Nothing in this Act shall alter the practice in any criminal cause or matter, or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division."

By s. 5: "Subject to the Supreme Court of Judicature Acts, and the Rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid."

(2) 2 De G. & J. 510.

(3) 34 Ch. D. 24.

(4) [1892] 2 Q. B. 173.

(5) [1894] 1 Q. B. 453.

(6) [1891] 1 Q. B. 671.

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Cave, J.

The decision of the Court of Appeal in the case of *Reg.* v. *Justices of County of London and London County Council* (1) does not go the whole length that we are asked to go in the present case. In that case the application was for a prohibition; it was admitted that, if the prohibition had been refused, there was jurisdiction to refuse it with costs; and it was assumed that if it were a case belonging to the Crown side of the Queen's Bench Division, costs could not be given. But the case there did not belong exclusively to the Crown side of the Queen's Bench Division, because formerly any of the superior Courts could grant prohibition, and in many such cases the Courts had given costs. The Court, therefore, held that there was power to make an order as to costs. The question there was whether s. 4 of the Supreme Court of Judicature Act, 1890, took away the power to make an order as to costs. The answer given was that the section did not take away that power; and I do not see how any other answer could well have been given. It is obvious that s. 4 does not take away any power that existed outside the Act, but is only a proviso affecting the terms of s. 5. It is argued that s. 5 does not extend the jurisdiction as to costs; but in my opinion s. 5 does profess to extend the jurisdiction. It expressly provides that, subject to the Acts and Rules, "the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." This is a proceeding in the Supreme Court, and therefore comes within the terms of s. 5. We must ascertain, therefore, whether the case is affected by the provisions of s. 4. It is not a criminal cause or matter or a cause or matter in bankruptcy; and, therefore, so far as those words go, s. 4 does not interfere with the application of s. 5. But then it is argued that s. 4 applies, because in the present case the proceedings are taken on the Crown side of the Queen's Bench Division. Now the reasoning in the decision to which I have already referred—*Reg.* v. *Justices of County of London and London County Council* (1)—so far as it tends to shew that in some cases costs could not be granted, applies to cases in which the proceedings could only be

(1) [1894] 1 Q. B. 453.

taken on the Crown side of the Queen's Bench Division; but proceedings in habeas corpus could be taken in other Courts, and it follows that, so far as those proceedings are concerned, s. 4 does not control s. 5. The result, therefore, is that power is given to the Court for the first time by the Supreme Court of Judicature Act, 1890, to award costs when granting an order for a habeas corpus. If s. 5 only referred to matters of procedure, I should think that the argument that it could not give any additional power to the Court would be well founded; but the section expressly and directly provides that the costs "shall be in the discretion of the Court or judge." I can see good reason why this clause should have been inserted in the Act. Previously Order LXV., r. 1, regulated the power of the Court to deal with costs; but in the case of *In re Mills' Estate, Ex parte Commissioners of Works and Public Buildings* (1) it was held that this rule did not enable an order to be made that persons should pay costs who could not previously have been ordered to pay them, and the clause in question (s. 5) was in consequence inserted in the Supreme Court of Judicature Act, 1890, giving power to deal with such costs. This power is limited by the first words of s. 5, and by the provisions of s. 4; but those limitations do not apply to the present case.

For these reasons I am of opinion that an order for payment of costs ought to be made.

COLLINS, J. I am of the same opinion. The question is whether s. 5 of the Supreme Court of Judicature Act, 1890, gives us power to order payment of costs. I am of opinion that it does. I think it gives the power, unless the case is taken out of the operation of s. 5 by the provisions of s. 4. The terms of s. 5 are general, "the costs shall be in the discretion of the Court." Sect. 4 provides that "Nothing in this Act shall alter the practice in any criminal cause or matter, or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division." If habeas corpus could only be obtained on the Crown side of the Queen's Bench Division, those provisions would come in, and the case of *London County Council* v. *Churchwardens and Overseers*

(1) 34 Ch. D. 24.

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Collins, J.

of West Ham (1) would apply. But these proceedings could be taken in other Courts. Then does s. 5 confer jurisdiction to deal with costs? I think it does. The Court of Appeal, in *In re Mills' Estate, Ex parte Commissioners of Works and Public Buildings* (2), treated the Judicature Acts and Orders as not giving any new jurisdiction to award costs. Cotton, L.J., said: "What was the object of these rules and orders? Was it to give to the Court a jurisdiction which did not previously exist, or was it not rather to regulate the manner in which the jurisdiction given to the Court, and which the Court had independently of this rule, was to be exercised? . . . The object of the Acts was not to give new jurisdiction." (3) The Lord Justice there treats Order LXV., r. 1, as shewing how the existing jurisdiction was to be exercised, but as conferring no new jurisdiction, and this continued to be the state of the law down to the commencement of the Supreme Court of Judicature Act, 1890. The effect in cases of prohibition is stated by Kay, L.J., in *Reg.* v. *Justices of County of London and London County Council* (4), where he says: "I have come to the conclusion that the High Court in cases of prohibition, which is not a jurisdiction peculiar to the Crown side of the Queen's Bench, has all the jurisdiction as to costs formerly exercised by the Courts of Chancery, Common Pleas, and Exchequer; and that as these last-mentioned Courts seem to have had and exercised jurisdiction to give costs against the defendant when granting a prohibition, the High Court now has a like jurisdiction." The same reasoning applies to habeas corpus, and it follows that we have jurisdiction to order payment of costs in the present case.

Order made for payment of costs. (5)

Solicitor for applicant: *Elliot Hutchinson.*

Solicitor for defendants: *W. A. Blaxland.*

(1) [1892] 2 Q. B. 173.
(2) 34 Ch. D. 24.
(3) 34 Ch. D. at p. 33.
(4) [1894] 1 Q. B. 453, at p. 461.
(5) See *In re Fisher*, [1894] 1 Ch. 450.

P. B. H.

[IN THE COURT OF APPEAL.]

C. A.
1894
May 25;
June 1.

IN RE VITORIA. EX PARTE VITORIA.

Bankruptcy—Petition—Final Judgment—Non-payment after Service of Bankruptcy Notice—Refusal to make Receiving Order—Second Bankruptcy Notice in respect of same Judgment Debt—"Res judicata"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7.

Upon the hearing in a county court of a bankruptcy petition against a judgment debtor, founded on his non-compliance with a bankruptcy notice served upon him by the judgment creditor, the registrar inquired into the consideration of the debt for which judgment had been obtained, and, being of opinion that it did not constitute a good petitioning creditor's debt, refused to make a receiving order:—

Held, by the Court of Appeal, that the decision of the registrar did not operate as res judicata with respect to the sufficiency of the petitioning creditor's debt, and did not therefore prevent the creditor from serving another bankruptcy notice, and obtaining a receiving order in respect of the same judgment debt.

APPEAL by J. F. Vitoria against a receiving order made by one of the registrars in bankruptcy, on the petition of a company called the Spanish Corporation, Limited.

On February 20, 1893, the company obtained judgment under Order XIV. against Vitoria for 13,049*l.* 6*s.* 10*d.*, for unpaid calls on shares, with interest and costs, and afterwards served a bankruptcy notice upon him in respect of the judgment debt. He failed to comply with the notice, and thus committed an act of bankruptcy. The company, on March 27, 1893, presented a bankruptcy petition against him in the Croydon County Court, within the jurisdiction of which Court he was then residing. At the hearing of the petition the registrar inquired into the consideration of the debt for which judgment had been obtained. He considered that there was not a good petitioning creditor's debt, and on June 20, 1893, he refused to make a receiving order. The company appealed to the Divisional Court, who allowed the appeal, and made a receiving order against the debtor. The debtor appealed to the Court of Appeal, who, on December 15, 1893, allowed the appeal, and restored the order of the county court, on the ground that no copy of the notice of the

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appeal to the Divisional Court had been sent to the registrar of the county court, as required by rule 132 of the Bankruptcy Rules, 1886, and that, consequently, the Divisional Court had no jurisdiction to hear the appeal: vide *In re Vitoria.* (1) The company then served a second bankruptcy notice upon the debtor in respect of the judgment debt. He failed to comply with this notice, and thus again committed an act of bankruptcy on February 6, 1894. The company, thereupon, presented a second bankruptcy petition against him in the Queen's Bench Division, he having then a place of business within the jurisdiction of that Division as the London Bankruptcy Court. On this petition the registrar on May 7, 1894, made the receiving order against which the present appeal was brought.

Jelf, Q.C., and *F. Cooper Willis*, for the debtor. There is a preliminary objection to the receiving order, viz., that the matter was res judicata by reason of the order of the county court. The appeal from that order having proved abortive, the order stands in the same position as if it had never been appealed from, and it is too late now to appeal from it.

The Court of Bankruptcy has power to go behind a judgment and to inquire into the validity of the judgment debt, and, if the registrar is not satisfied that there is a good debt, he can refuse to make a receiving order against the debtor: *Ex parte Lennox* (2); Bankruptcy Act, 1883, s. 7, sub-ss. 2, 3. That is what the registrar did in this case. The application for a receiving order in the High Court is founded on the same judgment debt; the only difference is that there is a new bankruptcy notice. The decision that there is not a good petitioning creditor's debt is binding. The maxim "Nemo debet bis vexari pro unâ et eâdem causâ" applies to all litigation. No doubt another creditor could have availed himself of the act of bankruptcy, but then he must have had a good debt of his own. The judgment of the county court was an estoppel as between the parties to it as to the validity of the debt. The only exception from the rule of res judicata is a decision analogous to a non-suit. The refusal to make a receiving order does not

(1) [1894] 1 Q. B. 259. (2) 16 Q. B. D. 315.

correspond to a non-suit. The judgment of the Divisional Court cannot be taken into consideration, for they had no jurisdiction in the matter, the proper notice not having been given. Though the registrar could not set aside the judgment, yet for the purposes of the bankruptcy petition he was entitled to try the question whether there was a debt or not. He has to see whether the requirements of s. 7 are satisfied.

Finlay, Q.C., and *A. Romer Macklin*, for the petitioning creditors. The registrar has no jurisdiction to finally decide whether there is a debt due to the judgment creditor; he has only power to go behind the judgment for the purpose of seeing whether he ought to make a receiving order. This is all that the registrar can do, and it is all that was done in the present case. The registrar can do this at the instance of the debtor himself as well as of the trustee on behalf of the creditors. The registrar cannot set aside the judgment; and, so long as it stands, there is a debt in respect of which bankruptcy proceedings can be taken.

LORD ESHER, M.R. The preliminary objection was taken that the registrar had no jurisdiction to entertain the second petition, because there was a res judicata between the parties, viz., that there never had been, and that there was not then, a valid debt as between the parties. This, it was said, had been, rightly or wrongly, adjudicated by the registrar of the Croydon County Court, and it was too late to appeal from his decision. In my opinion, when an application is made to a registrar in bankruptcy for a receiving order founded upon a judgment debt, the registrar has no jurisdiction to determine, as between the parties, that there never was a debt due. There is a judgment for the debt, and the judgment is still standing. As between the parties it is res judicata that there is a judgment debt, until the judgment is either set aside or satisfied. It is said, in effect, that the decision of the registrar is a res judicata upon a res judicata, and that the second puts an end to the first. Such a statement of the proposition seems of itself to shew that it cannot be true. Under s. 7 of the Bankruptcy Act, 1883, it is not the province of the registrar to adjudicate whether there is a valid debt; his business is to determine whether he shall make a receiving

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order, and for this purpose he is entitled to go behind the judgment. Take the strongest possible case. Suppose that the registrar should come to the conclusion that the judgment was obtained by fraud; he would then have power to say that he would not make a receiving order. But he would have no power to set aside the judgment, or to stay execution upon it. The authority of a registrar in bankruptcy depends entirely upon the Bankruptcy Act, and he has no power to set aside or to review a judgment. But the Court of Bankruptcy can refuse to make a receiving order in respect of a judgment which it cannot set aside. That is the effect of the decision in *Ex parte Lennox.* (1) A registrar in bankruptcy has large powers, but he has no power to set aside a judgment. All that he can do is to refuse to make a receiving order in respect of the judgment debt. That is the limit of his discretion. That being so, the case does not come within the doctrine of res judicata at all. The matter was res judicata in the county court as regards the particular bankruptcy notice upon which the petition there was founded, but not as regards another bankruptcy notice. There was no res judicata as regards the judgment debt. The registrar of the High Court might indeed have done exactly the same thing as the registrar of the county court did—that is, he might have refused to exercise his jurisdiction to make a receiving order. But he was not bound to do so, and he did not.

It is said that our decision will cause great inconvenience, by enabling a creditor to harass his debtor with renewed applications for a receiving order. The remedy for that is, I think, very simple. If a creditor persisted in attempting to obtain a receiving order against his debtor under precisely the same circumstances, the Court could exercise its discretion by refusing to make a receiving order. In my opinion, the doctrine of res judicata has no application to the present case, and the preliminary objection must be overruled.

KAY, L.J. I am of the same opinion. The preliminary objection is, that the registrar had no jurisdiction to make a

(1) 16 Q. B. D. 315.

receiving order, because there had already been an adjudication in the county court that the judgment did not constitute a debt upon which, after an act of bankruptcy had been committed by the debtor in not complying with a bankruptcy notice served upon him by the judgment creditors, a receiving order could be made. I entirely dissent from this view of the decision in the county court. It appears to me that all that the registrar had to decide under s. 7 of the Bankruptcy Act was, whether under the circumstances he would or would not make a receiving order. The bankruptcy notice was served in respect of, and the bankruptcy petition was founded upon, the judgment debt of 13,049*l.* The registrar of the county court, in the exercise of his undoubted jurisdiction, looking at all the circumstances of the case, was not satisfied that that judgment ought to have been given against the debtor, and for that reason he, in the exercise of his discretion, refused to make a receiving order. The creditors appealed to the Divisional Court, and that Court came to a different conclusion, holding that a receiving order ought to be made. Then there was an appeal to this Court, and they held that proper proceedings had not been taken for entering the appeal in the Divisional Court, and that therefore the Divisional Court were technically wrong in entertaining the appeal. The Court of Appeal expressed no opinion upon the merits of the case. We have, therefore, the decision of the county court that a receiving order ought not to be made, and the opinion of the Divisional Court that it ought to be made. Under these circumstances it is not to be wondered at that the creditors should issue a new bankruptcy notice, or that the registrar of the High Court should have thought that a receiving order ought to be made. Was it then a case in which the registrar ought to have said, whether the matter was or was not res judicata, "I will not entertain this petition"? If it had been a purely vexatious proceeding the registrar ought to have declined to entertain it, not on the ground that it was res judicata, but because it was vexatious. But here there could be no reason of that kind why the registrar should not make a receiving order, inasmuch as the Divisional Court had differed from the registrar of the county court, and it was proper for the registrar, if he had power to do so, to consider the matter

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again, and to exercise his own judgment upon the debt. In my opinion, he had the power of doing so, and the preliminary objection fails.

A. L. SMITH, L.J. No proceeding having been taken to vacate the judgment it still remains unreversed and unimpeached, and therefore it appears to me impossible to say that as between the parties to it there is not a judgment debt. In respect of that debt the registrar has made a receiving order. It is said by way of preliminary objection, that, by reason of the order of the Croydon County Court, it is res judicata that there is not a petitioning creditor's debt which will support an adjudication of bankruptcy or a receiving order. In my opinion, the registrar of the county court did not decide anything of the kind, and he had no jurisdiction to do so. He had no power to decide that there was not a valid judgment. He has only power under s. 7, "if he is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made," to dismiss the petition. In *Ex parte Lennox* (1), Cotton, L.J., said (at page 327), "The Court is not bound to make a receiving order, even if a debt is established." All that the registrar could do was to say (as he did say) that he was not satisfied with the proof of the petitioning creditors' debt, and to refuse to make a receiving order. There is, in my judgment, no res judicata in the present case.

Objection overruled.

June 1. The appeal was heard upon its merits and was dismissed.

Appeal dismissed.

Solicitor for debtor: *H. W. Christmas.*

Solicitors for petitioning creditors: *Jenkins, Baker, & Macklin.*

(1) 16 Q. B. D. 315.

W. L. C.

[IN THE COURT OF APPEAL.]

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Bankruptcy—"Property of Bankrupt"—Undischarged Bankrupt trading without Knowledge of Trustee—Second Adjudication—Rights of Creditors to Property acquired by Trading—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54.

A debtor, having been adjudged bankrupt and not having obtained an order of discharge, traded without the knowledge of the trustee in the bankruptcy and thereby acquired property. On May 11, 1893, he executed a deed by which he assigned all his personal property to a trustee for the benefit of his creditors, and in consideration of the assignment the creditors thereby released him from their debts. On June 16, 1893, a receiving order was made against him, the act of bankruptcy being the execution of the deed; and on July 11 he was adjudged bankrupt a second time:—

Held, reversing the decision of the Divisional Court, that the property so acquired by the bankrupt must be distributed as assets in the first bankruptcy.

Ex parte Ford (1 Ch. D. 521) followed.

Cohen v. *Mitchell* (25 Q. B. D. 262) explained and distinguished.

APPEAL by creditors in the second bankruptcy of J. T. Clark, a builder (who had been twice adjudged bankrupt) against an order of the county court at Hanley, directing that the net balance of the assets of the bankrupt (after payment of costs) should be distributed in the same manner as assets in the first bankruptcy, and any surplus to creditors under the second adjudication.

On May 9, 1884, a receiving order was made against Clark, and on May 23, 1884, he was adjudged bankrupt. J. Beardmore, one of the creditors, was appointed trustee in the bankruptcy. The assets realized were not sufficient to pay costs, and no dividend was paid to the creditors. On September 28, 1887, the trustee was released. Thereupon, by s. 82 (4) of the Bankruptcy Act, 1883, the official receiver became trustee in the bankruptcy. The bankrupt did not obtain an order of discharge, but he commenced trading again, and in so doing acquired property. Neither the creditors under the bankruptcy nor the official receiver had any knowledge of this trading.

On May 11, 1893, Clark executed a deed of assignment to a

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trustee for the benefit of his creditors. This deed was made between Clark of the first part, S. Pointon (the trustee) of the second part, and the several persons and firms who should execute or otherwise assent to the deed, of the third part. By the deed, in consideration of the release thereinafter contained, the debtor, as beneficial owner, assigned to the trustee all his personal estate, to hold the same upon trust for sale and realization, and after payment of costs to apply the same in payment of the creditors as in bankruptcy. And, in consideration of the assignment, the several parties of the third part did thereby respectively release and discharge the debtor, and his estate and effects, from their respective debts. There was a proviso that, in case a receiving order should be made against the debtor, on a petition presented by or against him within three calendar months after the date of the deed, then and in either of the said cases the release thereinbefore contained should be void and of no effect. On June 16, 1893, a receiving order was made against Clark on the petition of a creditor, the act of bankruptcy relied on being the execution of the deed of assignment, and on July 11 he was adjudged bankrupt a second time. No trustee was appointed by the creditors, and the bankrupt's property vested in the official receiver as trustee. The assets were realized by the official receiver, and he, under s. 89 (3) of the Bankruptcy Act, 1883, applied to the county court for directions as to whether the net assets should be distributed among (1.) the creditors in the first bankruptcy, or (2.) the creditors in the second bankruptcy, or (3.) the creditors in both bankruptcies.

Upon this application the county court judge made the order above mentioned.

The creditors in the second bankruptcy appealed to the Divisional Court.

Feb. 27. *Herbert Reed*, Q.C., and *E. Clayton*, for the appellants.

Muir Mackenzie, for the official receiver, as trustee in both bankruptcies.

VAUGHAN WILLIAMS, J. In my opinion we must decide that this property is vested in the official receiver as trustee in the

second bankruptcy, and that it ought to be administered in that bankruptcy. It is not necessary now to decide, and I shall not attempt to do so, what will be the rights of the creditors in the first bankruptcy under this administration. It must not be supposed that I do not entertain a strong opinion on this point, but I think I shall best discharge my duty by not expressing it now.

I must, however, attempt to explain the principles upon which I think this property should be administered by the trustee in the second bankruptcy. The law, I believe, stands in this way. By ss. 44 and 54 of the Bankruptcy Act, 1883, there is vested in the trustee in a bankruptcy all the property which may belong to the bankrupt at the commencement of his bankruptcy, or which may be acquired by or devolve on him before his discharge. There is no doubt that the property now in question accrued to the bankrupt before his discharge in the first bankruptcy, for he has not yet obtained his discharge, and therefore the words of the section are wide enough to cover that property. But, notwithstanding the words of the section, it seems to me that in the very nature of things, which not even an Act of Parliament can alter, property which comes into existence during a bankruptcy cannot vest in the trustee without his doing something to assert his title thereto. That, to my mind, is the real basis of the decision in *Herbert* v. *Sayer* (1), which seems to me not only to recognise the proposition that the after-acquired property will not vest in the trustee until he intervenes by some act indicating an intention to assert his title, but also to lay down that in the meanwhile the right to that property will vest in the bankrupt. Not only, therefore, is it necessary that there should be some intervention by the trustee in assertion of his title, but the bankrupt in the meanwhile gets such a title that he can, not only, as in *Herbert* v. *Sayer* (1), maintain an action to enforce his contractual rights, but also, as it seems to me was established by both *Morgan* v. *Knight* (2) and *Fyson* v. *Chambers* (3), assert his rights of property by means of an action of trover or detinue against any one who seeks to deprive him of his property. The

(1) 5 Q. B. 965. (2) 15 C. B. (N.S.) 669.
(3) 9 M. & W. 460.

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moment you have those two propositions all the rest appears to me to follow necessarily. If it be the law that, unless and until something is done by the trustee, the bankrupt, notwithstanding his bankruptcy and the absence of a discharge, has a right to the property which he acquires, one of the necessary essentials to that property is the right of dealing with it and parting with it, and if, while the property is his, because the trustee has not intervened, he parts with his property, it seems to me necessarily to follow that the person to whom he parts with it obtains a title to it. A doctrine of this kind is laid down in *Stevenson* v. *Newnham* (1), a case which dealt with fraudulent preference before that doctrine was, as it now is, embodied in a statutory form. The common law doctrine to which I am alluding was laid down there very clearly, viz., that although the trustee in a bankruptcy has a right to intervene and claim property which had been transferred by the bankrupt by way of fraudulent preference, yet, if it has been disposed of to a third person in the meanwhile for value, that person has a title superior to the title of the trustee. This being so, it seems to me that the only question in the present case is, whether the second bankruptcy, which took place before any intervention or assertion of title by the trustee in the first bankruptcy, must be dealt with on the same footing as an assignment for value by the bankrupt to a stranger. In my judgment it ought to be so dealt with. At one time the title of an assignee in bankruptcy depended upon an actual assignment to him by the Lord Chancellor, which was based upon the theory of an assignment (which did not in fact exist) by the insolvent debtor himself. It seems to me, therefore, that the trustee in the second bankruptcy is an assignee, and an assignee for value in this sense, that, as between the debtor and his creditors, the former could set up no answer to the claim of his creditors to the benefit of the property. For these reasons I think that the trustee in the second bankruptcy must be treated as entitled to this property as against the trustee in the first bankruptcy, and that he ought to have the administration of the property. I think it is unnecessary to consider *Ex parte Ford* (2), or any of the cases in which the decision was based upon the

(1) 13 C. B. 285. (2) 1 Ch. D. 521.

doctrine of estoppel, because I do not believe that the title of the trustee in the present case depends in the slightest degree on estoppel, any more than it depends on the doctrine of reputed ownership, a matter which was also discussed in *Ex parte Ford.* (1)

Something has been said in the course of the argument about the position of the trustee in the second bankruptcy being possibly improved by the intervention in point of time of the deed of arrangement of May 11, and the assignment contained therein; but I do not think that the trustee has any need to rely upon that assignment, nor do I think that he could do so successfully. From the principles which were discussed in *In re Stephenson* (2), I believe the truth of the matter is, that the moment the assignment in the deed of arrangement was dealt with as an act of bankruptcy it became void, not only as against the trustee, but as against all the world, and that no one can claim under or by virtue of it. I do not think I can usefully review any of the other cases which have been cited. I hope I have stated with sufficient clearness my view, be it right or wrong, of the law which governs this case. It will be observed that I do not think that the knowledge of the trustee in the first bankruptcy of what the bankrupt has been doing is in any way material to his title to the property in question.

WRIGHT, J. I am entirely of the same opinion. In theory property acquired by the trading of an undischarged bankrupt is acquired for the benefit of his estate in the bankruptcy; but it has long been established that in practice the presumption is the other way until the trustee in the bankruptcy intervenes. Now here, since the first bankruptcy a new set of creditors have in some way acquired rights of the kind to which *Cohen* v. *Mitchell* (3) applies, and they are entitled to retain those rights, unless the first trustee has intervened in time. Before the first trustee had intervened the bankrupt had by the assignment passed away a perfectly good title to his property as against every one except some future trustee in bankruptcy. It is true that that assignment became bad as an assignment upon the second adjudication; but

(1) 1 Ch. D. 521. (2) 20 Q. B. D. 540.
(3) 25 Q. B. D. 262.

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it was good till the moment of the second adjudication. At the very same time when, and by the same judicial act by which, the assignment was avoided, a new and even more powerful assignment was retrospectively created by the Bankruptcy Act to the trustee in the second bankruptcy, and not until after that did the trustee in the first bankruptcy intervene. I think he came too late, because a perfect title had by the statute become already vested in the second trustee. I think the trustee in the first bankruptcy is in this fatal dilemma. He has no title unless he confirms the second bankruptcy, because otherwise the prior assignment of May 11 is good against him. It is only by virtue of the second bankruptcy that he can get rid of that prior assignment, which was equally made before his intervention. As regards the equity of the matter, I think that for obvious reasons it would be highly inequitable to give the whole of the property to the creditors in the first bankruptcy. But as to whether the creditors under the first bankruptcy are to come in under the second, and, if so, how they are to rank, I agree with my learned brother that we ought not now to express any opinion.

Appeal allowed. Leave to appeal given.

The creditors in the first bankruptcy appealed.

Muir Mackenzie, and *Ringwood,* for the appellants. The question is, whether, when an undischarged bankrupt trades, without the knowledge of the trustee in his bankruptcy, and so acquires property, and then is adjudicated a bankrupt a second time, the property thus acquired is to be administered as assets in the first bankruptcy or in the second.

It is submitted that the Divisional Court were wrong in holding that the property should be administered as assets in the second bankruptcy. No doubt an undischarged bankrupt has a qualified property in goods acquired by him before his discharge, and he can confer a good title upon a purchaser for value. That is what was decided in *Cohen* v. *Mitchell.* (1) But the trustee in the second bankruptcy does not stand in the same position as a purchaser for value from the bankrupt. The words of s. 44 of the

(1) 25 Q. B. D. 262.

Bankruptcy Act, 1883 (1) are conclusive. The property was vested in the trustee in the first bankruptcy, and there was nothing which could vest in the trustee in the second bankruptcy. *Ex parte Ford* (2) is directly in point; s. 15 of the Bankruptcy Act, 1869, being in substance identical with s. 44 of the Bankruptcy Act, 1883. *Ex parte Ford* (2) was recognised in *Meggy* v. *Imperial Discount Co.* (3) *Ex parte Wainwright* (4) is to the same effect. *Morgan* v. *Knight* (5) and *Ex parte Watson* (6) shew that an adjudication of bankruptcy against an undischarged bankrupt is valid. In neither of those cases did the first assignee, who had allowed the bankrupt to trade, make any claim. In *Ex parte Ford* (2) the trustee in the prior bankruptcy claimed the after-acquired property, and his claim was successful. In *Cohen* v. *Mitchell* (7) the trustee in the earlier bankruptcy did not know of the bankrupt's trading, but the creditor who dealt with the bankrupt knew that he was undischarged. The limited protection given to an undischarged bankrupt and persons who deal with him bonâ fide and for value until the trustee intervenes, does not extend to real estate: *In re New Land Development Association and Gray.* (8) In *In re Rogers* (9) *Cohen* v. *Mitchell* (7) is clearly explained. The trustee in a bankruptcy is not an assignee for value from the bankrupt; he takes the

(1) By s. 44: "The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall comprise (inter alia) the following particulars:—

"(i.) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge."

Sect. 54: "(1.) Until a trustee is appointed the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged bankrupt, the property of the bankrupt shall vest in the trustee.

"(2.) On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed.

"(3.) The property of the bankrupt shall pass from trustee to trustee, including under that term the official receiver when he fills the office of trustee, and shall vest in the trustee for the time being during his continuance in office, without any conveyance, assignment, or transfer whatever."

(2) 1 Ch. D. 521.
(3) 3 Q. B. D. 711.
(4) 19 Ch. D. 140.
(5) 15 C. B. (N.S.) 669.
(6) 12 Ch. D. 380.
(7) 25 Q. B. D. 262.
(8) [1892] 2 Ch. 138.
(9) 8 Morrell's Bank. Rep. 236, at p. 241.

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property of the bankrupt as an officer of the law: *Jackson* v. *Forster* (1); *Ex parte Newitt* (2); *Stevenson* v. *Newnham.* (3)

The trustee in the first bankruptcy is entitled to the after-acquired property, unless either he has stood by and allowed third persons to acquire an equitable title, or has allowed goods to remain in the reputed ownership of the bankrupt.

The deed of assignment being an act of bankruptcy can have no effect whatever: *Doe* v. *Powell.* (4)

E. Clayton, (*H. Reed, Q.C.,* with him), for the creditors in the second bankruptcy. Valuable consideration was given for the assignment of May 11 in the release of the debtor by the creditors, so that there was a dealing by the bankrupt bonâ fide and for value before the trustee in the first bankruptcy intervened. The creditors in the second bankruptcy supplied the goods which helped to create the property which the bankrupt acquired.

So long as the second adjudication stands it must be taken to be valid.

Sect. 44 deals in the same way with property which belongs to the bankrupt at the commencement of the bankruptcy and property afterwards acquired by him before his discharge; but the after-acquired property must first vest in the bankrupt before it can vest in the trustee. It remains in the bankrupt until the trustee intervenes in some way. When the deed of May 11 was executed the trustee in the first bankruptcy had not intervened, and on the execution of that deed the property passed out of the bankrupt to the trustee appointed by the deed. *Cohen* v. *Mitchell* (5) applies. How has the property gone out of the trustee under the deed? Upon the second bankruptcy the deed became void only as against the trustee under that bankruptcy. It remained good as against all the world besides, including the trustee in the first bankruptcy. He can only avoid the deed by treating it as an act of bankruptcy, and that act gives a title to the trustee in the second bankruptcy. After the lapse of three months the deed would have been good even as

(1) 1 E. & E. 463.
(2) 16 Ch. D. 522.
(3) 13 C. B. 285.
(4) 5 B. & C. 308.
(5) 25 Q. B. D. 262.

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against the trustee in the second bankruptcy. By virtue of the release the trustee of the deed was a purchaser for value: *Butterfield* v. *Heath.* (1) In *Morgan* v. *Knight* (2), the assignee under the first bankruptcy did not know of the trading which resulted in the second adjudication. The bankrupt had a right to his after-acquired property against every one except the trustee in the first bankruptcy: *Drayton* v. *Dale* (3); and that trustee has lost his right.

No instance can be found of a disclaimer by a trustee in a bankruptcy of a lease acquired by the bankrupt after the commencement of the bankruptcy; it has never been suggested that such a lease vests in the trustee so as to make him liable upon the covenants, if he does no act to assume the liability.

The creditors in the second bankruptcy, who supplied the bankrupt with the goods which helped to create the property which he acquired, ought to be paid out of that property. There is an equity in their favour. Their money ought not to be used in paying the creditors in the first bankruptcy. The Court will direct the trustee, its own officer, to act equitably: *Ex parte Simmonds* (4); *In re Clark.* (5)

The bankrupt in trading and acquiring property was acting as the agent of the trustee: *Herbert* v. *Sayer* (6); *Jameson* v. *Brick and Stone Co.* (7) The trustee, though he did not know of the trading, can ratify what the bankrupt did.

Arthur Russell, for the official receiver.

LORD ESHER, M.R. There have been two adjudications of bankruptcy against J. T. Clark, and the official receiver, as the trustee under the first bankruptcy, claims that certain property of the debtor should be dealt with by him as assets in the first bankruptcy. The objection is taken that, after the first adjudication and before the bankrupt had obtained a discharge under it, he carried on a trade or business and in it incurred debts, and had creditors in respect of such trade or business, and that

(1) 15 Beav. 408.
(2) 15 C. B. (N.S.) 669.
(3) 2 B. & C. 293.
(4) 16 Q. B. D. 308.
(5) 6 Morrell's Bank. Rep. 42, 46.
(6) 5 Q. B. 965, 981.
(7) 4 Q. B. D. 208.

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he then made an assignment of all his property for the benefit of his creditors generally. The execution of this assignment was an act of bankruptcy, and thereupon one of the creditors presented a petition in bankruptcy upon which the debtor was adjudicated a bankrupt a second time, and the official receiver became trustee under that bankruptcy also. A contest has arisen between the two sets of creditors, as to which of them is entitled to the property acquired by the debtor by his trading while he was an undischarged bankrupt. The Divisional Court have held that the trustee under the second bankruptcy ought to have the administration of the fund; but they have declined to determine what the rights of the creditors under the first bankruptcy will be when the trustee in the second bankruptcy is administering the property of the bankrupt.

The case has been argued very fully, and a great number of authorities have been cited. The question is, What are the rights (so I think it ought to be put) of the trustee under the first bankruptcy? That bankruptcy is not yet at an end, for the debtor is an undischarged bankrupt; he is not discharged from the first bankruptcy. The rights of that trustee are determined by s. 44 of the Bankruptcy Act. That section says that "the property of the bankrupt divisible amongst his creditors" (that must mean divisible by the trustee in the bankruptcy) "shall comprise all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy."

Of course, there may be property belonging to the bankrupt at the commencement of the bankruptcy for which he has not made any payment—that is a common case. The trustee takes that property because it belongs to the bankrupt at the commencement of the bankruptcy; but he does not take it under any obligation to pay the creditors of whom it has been bought, or by whom it has been created. The trustee takes it and sells it, and receives the proceeds of the sale, and divides those proceeds amongst all the creditors rateably. The creditors who have produced or created that property for which the bankrupt has paid nothing have to come in and prove with the other creditors, and receive a dividend of perhaps only a shilling in the pound. Then s. 44 goes on, "shall comprise" (that is, for the purpose

of division) "all such property as may be acquired by or devolve on him before his discharge."

How does a man acquire property before his bankruptcy? One way is by buying it. How does a bankrupt acquire property after his bankruptcy before he is discharged, if he trades? By the same means—by buying it. If the property belonging to the bankrupt at the commencement of the bankruptcy is to be distributed by the trustee in the manner I have stated, it seems difficult (unless the case can be distinguished from *Ex parte Ford* (1)) to say that the trustee does not take the after-acquired property just in the same way as he took the property which the bankrupt had acquired before the bankruptcy—viz., he takes the property, and is not under any obligation to pay the creditors who have created it or have sold it to the bankrupt. If the Bankruptcy Act had stood alone, it would, I think, be difficult to see how the after-acquired property could be dealt with in any other manner. And the view of the Court of Appeal in *Ex parte Ford* (1) was certainly that which I have stated, and which seems to be the result of the Act. The after-acquired property is treated as having to be dealt with by the trustee in the bankruptcy precisely in the same way as the property belonging to the bankrupt at the commencement of the bankruptcy, not by reason of any abstract rule of justice—for the abstract rule of justice might be thought to be the other way—but upon the true construction of the Bankruptcy Act. Then after *Ex parte Ford* (1) came *Cohen* v. *Mitchell*. (2) The question there was not between the trustees in two bankruptcies, nor between a bankrupt and his trustee. It was a question between the trustee in a bankruptcy and traders or other persons who had dealt with the bankrupt after the bankruptcy. The Court, as it seems to me, were actuated by a desire to do as much as they could for the persons who had dealt with the bankrupt under those circumstances, and they said that in particular circumstances the case would no longer be governed by a strict interpretation of the Bankruptcy Act, but would be taken out of s. 44. But under what circumstances? "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with

(1) 1 Ch. D. 521. (2) 25 Q. B. D. 262.

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any person dealing with him bonâ fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid as against the trustee." That was going a long way. Does the present case come within that rule? In my opinion it does not. There was no "dealing" with the bankrupt in the sense in which that word is used in *Cohen* v. *Mitchell* (1); there were transactions with him bonâ fide, but there was no dealing with him, and certainly no dealing with him for valuable consideration. If that be so, this case must be governed by s. 44 of the Act, and is not taken out of it by the doctrine laid down in *Cohen* v. *Mitchell.* (1) It is impossible to suppose that the judges who decided that case intended to overrule *Ex parte Ford.* (2) It was cited to them; their attention was called to it, and they considered it; and when they decided *Cohen* v. *Mitchell* (1) they must have meant to say that in its material circumstances it differed from *Ex parte Ford.* (2) Therefore, *Ex parte Ford* (2) is the ordinary case, and *Cohen* v. *Mitchell* (1) the exceptional one.

There is another state of things, which is also exceptional—viz., when the bankrupt, with the knowledge of the trustee and with his consent, carries on a trade before he is discharged. That is not the present case, because it is found that the first trustee knew nothing about the subsequent trading. Therefore, according to *Ex parte Ford* (2), this case is within s. 44, and it cannot be brought within any rule which has been yet established to remove it from the obligations of that section.

The last suggestion made was that the bankrupt, trading while he was undischarged, was trading as the agent of the original trustee; and it is said that, if he was the trustee's agent, the trustee, if he takes the benefit of the goods which have been acquired by that trading, must take also the burden of paying for them. I must confess that I cannot see how, by any application of the law of principal and agent, the bankrupt can be said to have been the agent of the trustee. And, moreover, if it be true that he was the agent of the trustee, *Ex parte Ford* (2) must have been wrongly decided, and I am not prepared to overrule *Ex parte Ford.* (2)

(1) 25 Q. B. D. 262. (2) 1 Ch. D. 521.

Therefore, notwithstanding the very able arguments which have been addressed to us, I think this case must be decided exactly as *Ex parte Ford* (1) was decided. We must differ from the conclusion of the Divisional Court, and the appeal must be allowed.

A. L. SMITH, L.J. The question which we have to decide is whether, the bankrupt having, while he was trading without a discharge, acquired property of the value of over 500*l.*, his estate is to be administered by the official receiver in the second bankruptcy, or in the first bankruptcy, which is still pending. The Divisional Court have held that the estate is to be administered in the second bankruptcy, and the question is whether their decision is correct.

By s. 44 of the Bankruptcy Act, 1883, it is provided that the property of the bankrupt "shall comprise all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." Therefore, as has been already pointed out by my Lord, if matters rested there, not only property which belonged to the bankrupt at the commencement of the bankruptcy, but all property which he might acquire or which might devolve upon him before his discharge (and this bankrupt has never got his discharge), would be the property of the first trustee and not of the second. But an exception has apparently been engrafted upon the section, and a distinction has been drawn in some cases between property which belonged to the bankrupt at the commencement of the bankruptcy and property afterwards acquired by him. It has been held that, as regards the after-acquired property, until the trustee intervenes, the bankrupt, though undischarged, is in a position to give a title to persons who deal with him bonâ fide and for value. It was pointed out by Fry, L.J., in *Cohen* v. *Mitchell* (2), that, on an action being brought by an undischarged bankrupt against a debtor who had dealt with him, the defendant could not defeat the claim, unless in his plea he averred not only that the plaintiff

(1) 1 Ch. D. 521. (2) 25 Q. B. D. 262.

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was an undischarged bankrupt, but also that the trustee in the bankruptcy had intervened. That has been decided, and is not now questioned, the present dispute being between the trustee under the first bankruptcy and the trustee under the second bankruptcy. *Ex parte Ford* (1) has been cited to us, and I think it is because that case was not brought prominently to the attention of the judges of the Divisional Court that they decided the present case on the authority of *Cohen* v. *Mitchell* (2), and not on the authority of *Ex parte Ford.* (1) I cannot distinguish the present case from *Ex parte Ford* (1), nor has Mr. Clayton in his very able argument been able to do so. *Ex parte Ford* (1), which my brother Williams rather glossed over and said he would not discuss, and my brother Wright did not deal with at all, was decided by the Court of Appeal, and it was on all-fours with the present case. The question there was, as it is here, between the trustee in a first liquidation and the trustee in a second liquidation (a liquidation being equivalent to a bankruptcy), and the point was, whether, the first liquidation being unclosed, the after-acquired property of the debtor was to go to the trustee in the first liquidation or to the trustee in the second liquidation. That case is conclusive to shew that, if the trustee in the first bankruptcy had not permitted, or consented to, or known of the debtor's going on trading, and thus acquiring property, the property so acquired goes to the trustee in the first bankruptcy, and not to the trustee in the second. Beyond all doubt, that was the decision in that case.

Then *Ex parte Ford* (1) was afterwards considered in *Meggy* v. *Imperial Discount Co.* (3), a case which is not entirely on all-fours in its facts with either the present case or *Ex parte Ford* (1); but I find that Cotton, L.J., again affirmed what had been laid down in *Ex parte Ford* (1), for he said, at p. 721: "The doctrine, that knowledge of the dealing by the insolvent with the property left in his charge is essential to deprive the trustee of it, is adopted by Jessel, M.R., in *Ex parte Ford.*" (1) Therefore we have two cases in the Court of Appeal, *Ex parte Ford* (1), which

(1) 1 Ch. D. 521. (2) 25 Q. B. D. 262.
(3) 3 Q. B. D. 711.

is identical with the present, and *Meggy* v. *Imperial Discount Co.* (1), two or three years afterwards, affirming the decision in *Ex parte Ford.* (2)

In that state of the authorities, what ought we to do? The present case is undistinguishable from *Ex parte Ford* (2), and yet the learned judges in the Court below (their attention not having been prominently directed to *Ex parte Ford* (2)), decided the present case on the authority of *Cohen* v. *Mitchell* (3), applying the doctrine that an undischarged bankrupt can deal with his after-acquired property, or, as it was said, "until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid as against the trustee"; and holding that by virtue of that rule the second trustee was a person "dealing with the debtor bonâ fide and for value." I must point out that in *Cohen* v. *Mitchell* (3), as I read it, this Court was not deciding, as it was in *Ex parte Ford* (2), what were the respective rights of the first trustee and the second trustee in a case like the present; they were simply deciding what was the position of creditors who had dealt with an undischarged bankrupt before the trustee in the bankruptcy had intervened, and the rule which I have already read was laid down. It seems to me, therefore, that the learned judges of the Divisional Court were in error in deciding this case upon the doctrine laid down in *Cohen* v. *Mitchell.* (3) In my judgment *Cohen* v. *Mitchell* (3) does not apply to the present case, but it is entirely within the four corners of the decision in *Ex parte Ford.* (2)

But it is said by Mr. Clayton that, according to the judgment of my brother Wright (with which my brother Williams did not agree, and I think he was right), inasmuch as there had been an assignment by the bankrupt in favour of his creditors on May 11, 1893, although that was afterwards held to be an act of bankruptcy, and on it the second bankruptcy was founded, still that deed must be taken to be an "assignment" within the doctrine of *Cohen* v. *Mitchell.* (3) I have already said that

(1) 3 Q. B. D. 711. (2) 1 Ch. D. 521.
(3) 25 Q. B. D. 262.

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in my judgment this point was not discussed or decided in *Cohen* v. *Mitchell* (1), and I agree with my brother Williams that it does not avail the respondent.

A third point was taken by Mr. Clayton, with which I felt somewhat pressed for a time. If, said he, it is held that these assets are to be administered in the first bankruptcy, the result will be, that, inasmuch as these assets have really come out of the pockets of those creditors who have dealt with the debtor as an undischarged bankrupt, their money will go to satisfy the creditors under the first bankruptcy; and, therefore, the creditors under the first bankruptcy will be paid with the money of the creditors under the second. Therefore, it was said, that, if the trustee in the first bankruptcy comes in and takes the benefit of the after-acquired property of the bankrupt, he must not "approbate and reprobate"; he must pay the debts before he takes the assets in respect of which those debts are due, or, if he takes the assets, he must pay the debts out of them. The Master of the Rolls has pointed out that this would not be in accordance with the rules of bankruptcy. In the case of a first bankruptcy the whole of the existing property of the bankrupt vests under s. 44 in the trustee at once; he takes it all at once, and has not to pay any of the liabilities of the bankrupt before the whole of the property vests in him. On the contrary, the whole of the bankrupt's property (I am not speaking of after-acquired property) at once vests in the trustee, and the creditors must come in and prove, and get what dividend they can out of the property which is there.

In my opinion this last point also fails, and for these reasons I think this appeal should be allowed.

DAVEY, L.J. I also am of opinion that this case is governed by authority which is binding upon us, and I should content myself with saying this, were it not that we are differing from the learned judges in the Court below, who have obviously bestowed great attention and consideration on the case.

We have first to look at the words of the statute. The effect of ss. 44 and 54 of the Bankruptcy Act is this, that all such

(1) 25 Q. B. D. 262.

property as may be acquired by or devolve upon the bankrupt after the commencement of the bankruptcy, and before his discharge, is to vest in the trustee, and to be divisible by him amongst the creditors, meaning, of course, the creditors who are entitled to prove in the bankruptcy, and who have done so.

If we apply the words of the statute literally, there can be no doubt what our decision ought to be in this case. But we have been referred to cases in which the question has been considered how far, when the bankrupt while undischarged has been dealing bonâ fide and for value with third parties, those third parties can maintain, as against the trustee, a title to the property acquired by the bankrupt. That was obviously the only question to be considered in those cases. I will take two examples. In *Morgan* v. *Knight* (1) Erle, C.J., said, at page 677: "The result of the cases is, not only that he (the bankrupt) may acquire property, but that he may hold it against all the world except his assignees, and may create rights to hold it against them, if they expressly or impliedly consent to such property being in his order and disposition at the time of a subsequent bankruptcy." And in *Cohen* v. *Mitchell* (2) the rule is thus stated: "Until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee."

That is a very beneficial and, I have no doubt, a very just rule, as regards the rights of third parties dealing bonâ fide and for value with the bankrupt after his bankruptcy. But nothing which was there laid down touches the question of the rights of the trustee in a first bankruptcy, under the circumstances of the present case, as against the trustee in a second bankruptcy. In my opinion that question is conclusively settled for us by *Ex parte Ford* (3), a decision of the Court of Appeal which binds us. I cannot distinguish that case from that which is now before us, and I do not think that decision was overruled or in any way impeached by *Cohen* v. *Mitchell.* (2) And, as A. L. Smith, L.J., has pointed out, *Ex parte Ford* (3) was referred to by Cotton, L.J.,

(1) 15 C. B. (N.S.) 669. (2) 25 Q. B. D. 262.
(3) 1 Ch. D. 521.

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with approval in the subsequent case, *Meggy* v. *Imperial Discount Co.* (1)

Now, Vaughan Williams, J., has decided the present case on the authority of *Cohen* v. *Mitchell.* (2) He seems to have thought that the principle of *Cohen* v. *Mitchell* (2) ought to be extended to the title of the trustee in a second bankruptcy, for he said that he thought the second bankruptcy "must be dealt with on the same footing as an assignment for value by the bankrupt to a stranger," and at the end of his judgment he said: "I do not think that the knowledge of the trustee in the first bankruptcy of what the bankrupt has been doing is in any way material to his title." If that be so, I can only say that *Ex parte Ford* (3) cannot have been adequately considered by the learned judge. But I must express my dissent from the learned judge's proposition that the trustee in a bankruptcy stands in the same position as a particular assignee for value of the bankrupt. The general assignee of all a bankrupt's property stands, in my opinion, in a very different position from a particular assignee for value, and I greatly doubt whether a general assignee of all a bankrupt's property is within the principle of the rule which was laid down in *Cohen* v. *Mitchell.* (2) The broad and general principle is, that the trustee in a bankruptcy takes only the property of the bankrupt, and takes it subject to all the liabilities and equities which affect it in the bankrupt's hands, unless, indeed, he takes the property in question under some particular provision such as the order and disposition clause.

Wright, J., took another point, which has also been fully argued by Mr. Clayton. He relied upon the assignment executed by the bankrupt on May 11, and endeavoured to place the first trustee in a dilemma. "If you say that the assignment is bad, this can only be because of the second bankruptcy. If, on the other hand, you say the assignment is good, it takes the property away from you." The answer to that is, I think, a very short one, viz., that all that *Cohen* v. *Mitchell* (2) decided was that persons who have been dealing bonâ fide for value with the bankrupt may have a good title as against the trustee in the

(1) 3 Q. B. D. 711. (2) 25 Q. B. D. 262.
(3) 1 Ch. D. 521.

bankruptcy; but that rule exists only in favour of persons who have so dealt. The persons respondents to this appeal are not claiming under that assignment, and the trustee in the first bankruptcy is not claiming in competition with the persons who claim under the assignment. No question of that kind, therefore, can or does arise in this case. There is, moreover, the answer which was given by anticipation by Vaughan Williams, J., to the view which was subsequently expressed by Wright, J.

I must say a word upon the last point which was urged by Mr. Clayton. He said, "If you take away this property from the creditors under the second bankruptcy, you will be taking away from them that which has been created by means of the liabilities which the bankrupt has incurred to them in carrying on the business." He pointed out that Tindal, C.J., in *Herbert* v. *Sayer* (1), likened the position of an uncertificated bankrupt carrying on business to that of an agent for the assignees. I am inclined to think that it would be very reasonable to hold, in accordance with a well-known principle of equity in similar cases, that the trustee should not take the fruits of the bankrupt's trading without discharging the liabilities by means of which those fruits had been created. But, in the first place, the words of s. 44 vest this property in the trustee to be distributed by him amongst the creditors under the first bankruptcy. The Act contains no words from which I can judicially infer that the trustee is at liberty to divert that property from the statutory purposes to which it is made applicable. And, in the second place, I think that this argument cannot prevail against the decision in *Ex parte Ford* (2), for, if the argument were sound, *Ex parte Ford* (2) ought to have been decided differently.

I therefore agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *J. Godwin Hammack, for Bennett & Baddeley, Hanley; C. Robinson & Co., for A. G. & S. Hooper, Dudley; Solicitor to the Board of Trade.*

(1) 5 Q. B. 965, at p. 981. (2) 1 Ch. D. 521.

W. L. C.

1894
June 6.

MASSEY v. MORRISS.

Ship—Merchant Shipping Acts—Offences—Overloading Ship—Liability of Owner for Act of Master—Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *s.* 28.

The owner of a British ship, which without his knowledge or assent is overloaded by the master in breach of the provisions of s. 28 of the Merchant Shipping Act, 1876, is not responsible for the act of the master so as to be liable to the penalty created by the section.

CASE stated by the stipendiary magistrate for Liverpool. The appellant was the owner of a British ship called the *Opah*, which in December, 1893, loaded a cargo at Hymassi, in the island of Negropont in Greece, and with such cargo on board sailed thence for Garston. The *Opah* at the time of leaving Hymassi was so loaded as to submerge in salt water the centre of the disc to the knowledge of the master. The said master had been appointed by the appellant; but the appellant was not aware of the overloading of the *Opah*. The appellant was summoned under s. 28 of the Merchant Shipping Act, 1876 (1) for having allowed the ship to be overloaded in breach of the provisions of that section; and the stipendiary magistrate, being of opinion that the appellant was responsible for the act of the master, convicted him subject to a case for the opinion of the Court.

Pickford, Q.C., and *Maurice Hill*, for the appellant. The owner, being unaware of the overloading, cannot be said to have "allowed" it. There is nothing in the Act to shew an intention to make the owner criminally answerable for the misconduct of the master. The magistrate proceeded upon the authority of the cases under the Licensing Acts, in which it has been held that the misconduct of the licensed person's servant is imputable to his master. But those cases are distinguishable. Under the sections of the Licensing Acts under which those cases were

(1) By s. 28 of the Merchant Shipping Act, 1876: "Any owner or master of a British ship who allows the ship to be so loaded as to submerge in salt water the centre of the disc shall, for each offence, incur a penalty not exceeding one hundred pounds."

decided, the only person who is punishable is the licensed person himself; and consequently, unless he is to be held liable for the act of his servant, the offences might be committed with impunity. But under s. 28 of the Merchant Shipping Act, 1876, the liability is imposed upon the master as well as upon the owner.

H. Sutton, for the respondent. The intention of the legislature in this Act was that primâ facie the knowledge of the master should be imputed to the owner. Where the Act requires personal knowledge on the part of the owner as an ingredient in his liability it in terms says so. Thus, in s. 22, it provides that "if the managing owner *knowingly* allows any grain cargo to be shipped contrary to the provisions of the section" he shall be liable to a penalty. In s. 28 the word "knowingly" is omitted. It was upon the corresponding omission of the word "knowingly" in ss. 16, sub-s. 3, and 17 of the Licensing Act, 1872, that the judgment of Archibald, J., in *Mullins* v. *Collins* (1), and of Manisty, J., in *Bond* v. *Evans* (2), proceeded; in the former of which cases it was held that a licensed person, whose servant without his knowledge supplied liquor to a constable on duty, was liable to be convicted of so supplying it; and in the latter, that where the servant of a licensed person had permitted gaming to take place on the licensed premises without his master's knowledge or connivance, the licensed person himself was rightly convicted of suffering gaming.

Again, in s. 24 of the present Act, which deals with the offence of carrying deck loads of timber in winter, it is provided that "the master of the ship, *and also the owner if he is privy to the offence*," shall be liable to the penalty inflicted by the section.

CAVE, J. This case seems to me to be reasonably clear. The words of the section are, "Any owner or master who allows the ship to be so loaded as to submerge in salt water the centre of the disc." Then, did the appellant allow the ship to be so loaded? There is no evidence whatever that he did so unless the mere fact that he appointed the master who allowed it to be done amounted to an "allowing" of it by himself. But I do

(1) Law Rep. 9 Q. B. 292. (2) 21 Q. B. D. 249.

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not think that that could possibly have been the intention of the legislature. Of course, there may in some cases be circumstances from which you may fairly draw the conclusion that the owner appointed a particular master knowing that he would overload the ship, and intending that he should do so; but there is no evidence of any such circumstances here. There is nothing beyond the bare fact that the appellant appointed the master, and that is not enough. Reference was made to the alehouse cases. But the explanation of those cases is this: licences to keep alehouses are only granted to persons of good personal character, and it is obvious that the object of so restricting the grant of licences would be defeated if the licensed person could, by delegating the control and management of the house to another person who was altogether unfit to keep it, free himself from responsibility for the manner in which the house was conducted. The cases are not analogous. The appeal must be allowed.

COLLINS, J. I am of the same opinion.

Conviction quashed.

Solicitors for appellant: *Hill, Dickinson, & Co., Liverpool.*
Solicitor for respondent: *Solicitor to the Board of Trade.*

J. F. C.

IN RE MEUNIER.

1894
June 11.

Criminal Law—Extradition — Offence of a Political Character — Anarchist Outrages—Evidence of Accomplice — Corroboration—One Committal for two Offences—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 3, *sub-s.* 1.

A prisoner committed for extradition, on two charges of committing anarchist outrages in France, by causing explosions at a café and at certain barracks, applied for a writ of habeas corpus. The two charges were included in one committal:—

Held, that if the charges had depended on the uncorroborated evidence of an accomplice (which was not the case), that would not be a ground for discharging the prisoner, for absence of corroboration was not conclusive in favour of a prisoner's right to acquittal, but the magistrate had a discretion as to whether the evidence was sufficient to justify a committal, that separate committals were not necessary, that the outrage at the barracks was not an offence of a political character, within the meaning of s. 3, sub-s. 1, of the Extradition Act, 1870, for to constitute a political offence there must be two or more parties in the State, each seeking to impose the government of their own choice on the other, which was not the case with regard to anarchist crimes, and therefore the prisoner was liable to extradition.

APPLICATION for a writ of habeas corpus to bring up and discharge a prisoner named Meunier, who had been committed by Sir John Bridge, the Chief Magistrate at Bow Street, for surrender to the French Government under the Extradition Acts, 1870 and 1873 (33 & 34 Vict c. 52; 36 & 37 Vict. c. 60).

The prisoner was charged with wilfully causing two explosions in France, one at the Café Véry in Paris, which caused the death of two persons, and the other at certain barracks. It was proved by the witnesses whose depositions were taken in France, as well as by a statement voluntarily made by the prisoner himself to the inspector of police who arrested him in London, that the prisoner was an anarchist.

The application was made in vacation (1) by summons at chambers, which Kennedy, J., referred to the Court.

The grounds of the application were four: (1.) that there was no evidence that the prisoner Meunier, who was brought up and committed at Bow Street, was the same person as Meunier, who was charged with the offences committed in France, and was

(1) Crown Office Rules, 1886, r. 238.

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referred to in the depositions taken in France; (2.) that the evidence relied on to connect the prisoner with the offences charged was the evidence of an accomplice, and was not corroborated; (3.) that two separate and distinct offences were included in one committal; (4.) that the explosion at the barracks was an offence of a political character, within the meaning of the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3, sub-s. 1 (1), and therefore the prisoner was not liable to be surrendered in respect of that offence.

Burnie, for the prisoner, moved for an order for a habeas corpus, on the four grounds already stated.

The Solicitor General (*R. T. Reid, Q.C.*), (*The Attorney General* (*Sir John Rigby, Q.C.*), and *H. Sutton*, with him), for the Crown. As to identity, there are numerous points in which the facts stated, and the description of the accused given, in the depositions taken in France, coincide exactly with the facts appearing on the hearing at Bow Street, and all these coincidences taken together amount to ample evidence of identity.

As to corroboration, it is not a rule of law that an accomplice must be corroborated, but the question is one of practice, and the absence of corroboration would not be sufficient to invalidate a committal, where the magistrate, in the exercise of his discretion, was of opinion that a primâ facie case had been made out. In the present case, however, there is, in the French depositions, sufficient evidence of corroboration, if it were necessary.

As to the committal, the statute does not require separate committals.

As to the question of an offence of a political character, the evidence against the prisoner is such as to support charges of murder, attempt to murder, and wilful damage to buildings, which are in no sense political offences.

Burnie, for the prisoner. The evidence of identity is insufficient.

As to corroboration, it is a universal rule that no person ought

(1) 33 & 34 Vict. c. 52, s. 3: "The following restrictions shall be observed with respect to the surrender of fugitive criminals: (1.) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character."

to be convicted on the uncorroborated evidence of an accomplice, and there is no corroboration here. The Court has power to review the decision of the magistrate on this point: *In re Castioni* (1), per Denman, J., at p. 157, per Hawkins, J., at p. 161; *In re Guerin.* (2)

The committal is bad, as it includes two separate and distinct charges.

As to the question of a political offence, it cannot be contended that the explosion at the Café Véry was a political offence; but, as to the explosion at the barracks, the case is different, for the evidence shews an attempt to destroy Government property, the quarters occupied by the soldiers of the French Government. The decision in *In re Castioni* (1) is in the prisoner's favour on this question.

CAVE, J. I am of opinion that this application for a writ of habeas corpus must be refused.

The principal ground relied on by Mr. Burnie on behalf of the prisoner is, that there was no evidence of the identity of the prisoner Meunier, who was brought up and committed at Bow Street, with the accused man Meunier, who is referred to in the depositions taken in France, to warrant the committal of the prisoner for the purpose of extradition. That is the point to which he attaches the most importance.

The second point is, that the evidence against the accused was the evidence of an accomplice, and there is no sufficient corroboration to warrant his committal.

The third point is, that there are two charges, and only one committal, and that there should be two committals.

The fourth point is, that, so far as relates to the outrage at the barracks, the offence charged is one of a political character, and therefore the accused is not liable to be surrendered under the Extradition Acts.

I will take the second point first. The question is whether the witness, on whose evidence the charges against the accused mainly depend, is corroborated by the other witnesses, whose evidence appears on the depositions taken in France.

(1) [1891] 1 Q. B. 149. (2) 58 L. J. (M.C.) 42.

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IN RE MEUNIER.

Cave, J.

[The learned judge here dealt with the various statements of fact relied upon by the prosecution as corroboration, and continued as follows:—]

It is impossible to deal with the point by taking separately each single fact stated, and saying it is a small matter, and does not amount to corroboration; that may be so, but the whole of the facts taken together form a strong body of circumstantial evidence in corroboration. In my judgment the fact that there is not corroborative evidence is not conclusive in favour of the accused; but the magistrate must exercise his discretion in each case in arriving at a conclusion as to whether there ought to be a committal or not. It is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence; for the evidence must be laid before the jury in each case. No doubt, it is the practice to warn the jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated; but I know of no power to withdraw the case from the jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground. (1) The magistrate has a discretion in each case, as to whether the evidence is or is not sufficient to justify a committal; and in the present case, in my opinion, the magistrate has exercised that discretion rightly.

The next point which I will deal with is as to the evidence of identity. It is true that no one was called to identify the man Meunier, who was brought up at Bow Street, with the Meunier referred to in the depositions taken in France. But there were many circumstances tending to shew the identity, and the prisoner was before Sir John Bridgé, who had the opportunity of comparing him with the description given by the French witnesses.

[The learned judge here dealt with the evidence as to identity, and continued as follows:—]

In the face of these facts the slight discrepancy between the christian name given by the French witnesses and that in the committal order (Théodule and Théodore) sinks into nothing, and in my opinion that point also fails.

(1) See *Reg.* v. *Stubbs*, Dearsley & Pearce's C. C. 555; *Reg.* v. *Boyes*, 1 B. & S. 311.

The next point is a technical one, namely, that there are two offences charged, and only one committal; but I find nothing in the statutes requiring separate committals.

The last point taken is, that, so far as regards the outrage at the barracks, the offence charged is one of a political character, and therefore the accused is not liable to be surrendered under the Extradition Acts; for it is said that the outrage was an attack on Government property, and was an attempt to destroy the quarters occupied by the troops of the French Government. It appears to me that, in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and that, if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not. In the present case there are not two parties in the State, each seeking to impose the Government of their own choice on the other; for the party with whom the accused is identified by the evidence, and by his own voluntary statement, namely, the party of anarchy, is the enemy of all Governments. Their efforts are directed primarily against the general body of citizens. They may, secondarily and incidentally, commit offences against some particular Government; but anarchist offences are mainly directed against private citizens. I agree, as to this question also, with the view taken by Sir John Bridge; and I am of opinion that the crime charged was not a political offence within the meaning of the Extradition Act.

For these reasons I am of opinion that the contention on behalf of the prisoner fails on all grounds, and that the application for a writ of habeas corpus must be refused.

Collins, J. I am of the same opinion, and on the same grounds.

Application refused.

Solicitor for the Crown: *The Solicitor to the Treasury.*

Solicitor for the prisoner: *T. O. Evans.*

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[IN THE COURT OF APPEAL.]

THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* PARR AND OTHERS.

Copyhold—Implied Admittance—Acceptance of Rent by Lord after Change of Tenancy—Seizure quousque—Statutes of Limitations (3 & 4 *Wm.* 4, c. 27; 37 & 38 *Vict. c.* 57).

The acceptance of quit-rents in respect of copyholds by the lord of a manor from a person paying them as heir or surrenderee amounts to or implies an admittance of such person as tenant of the copyholds if the lord knows that such quit-rents are paid by him as heir or surrenderee.

The Statutes of Limitations apply to a seizure quousque of copyholds by the lord of a manor, and the period fixed by those statutes begins to run from the time at which, after proclamation or notice, the heir has failed to come in and be admitted.

ACTION tried before Wright, J., without a jury.

The facts and arguments sufficiently appear from the judgment.

Jan. 22. *Bosanquet, Q.C.*, and *Archibald Brown*, for the plaintiffs.

Channell, Q.C., and *Godefroi*, for the defendants.

[The following cases were cited or referred to: *Froswell* v. *Welch* (1); *Doe* d. *Tarrant* v. *Hellier* (2); *Wilson* v. *Allen* (3); *Vaughan* v. *Atkins* (4); *Glass* v. *Richardson* (5); *Doe* d. *Bover* v. *Trueman* (6); *Doe* d. *Tofield* v. *Tofield* (7); *Reg.* v. *Garland* (8); *Garland* v. *Mead* (9); *Whitton* v. *Peacock* (10); *Walters* v. *Webb* (11); *In re Lidiard and Jackson's and Broadley's Contract.* (12)]

Cur. adv. vult.

Jan. 29. WRIGHT, J., read the following judgment. This action is a step in the proceedings taken by the plaintiffs as lords of the manor of Mucking, in the county of Essex, which

(1) Godb. 268; Cro. Jac. 403; 1 Roll. Rep. 415; 3 Bulst. 214.
(2) 3 T. R. 162.
(3) 1 Jac. & W. 611.
(4) 5 Burr. 2765.
(5) 2 D. M. & G. 658.
(6) 1 B. & Ad. 736.
(7) 11 East, 246.
(8) Law Rep. 5 Q. B. 269.
(9) Law Rep. 6 Q. B. 441.
(10) 3 My. & K. 325.
(11) Law Rep. 5 Ch. 531.
(12) 42 Ch. D. 254.

formerly belonged to the Dean and Chapter of St. Paul's and is now vested in the plaintiffs, for the purpose of compelling the defendants Saunders and Hicks to take admittance to certain copyhold tenements comprised in Mucking Hall Farm and Sutton's Farm, which form part of such manor, and to pay fines upon such admittance.

The facts are as follows: In 1821 the father of the defendant Hicks was admitted on the court rolls to the Sutton's Farm copyholds as trustee for the father of one Cox. In 1836 Cox was admitted on the court rolls to one part of the Mucking Hall Farm copyholds as heir to his father, and in 1844 he was admitted to the other part of the copyholds of Mucking Hall Farm as a purchaser. In 1868 the father of the defendant Hicks died, and thereupon the defendant Hicks, as trustee for Cox, succeeded to the tenancy of the Sutton's Farm copyholds. In 1870 Cox died, having devised to the defendants Saunders and Hicks, and another person now deceased, as trustees, all his estate and interest in both the Sutton's Farm copyholds and the Mucking Hall Farm copyholds. Neither the defendant Hicks, as heir to his father of the Sutton's Farm copyholds, nor the trustees of Cox, as devisees of the Mucking Hall Farm copyholds, can be shewn to have been actually admitted on the court rolls. From 1875 the quit-rents have been regularly collected by the plaintiffs' collector from Cox's trustees in respect of the copyholds both of Mucking Hall Farm and of Sutton's Farm. The collector gave receipts to Cox's trustees in forms prescribed by the plaintiffs' agents, and he paid over the rents so collected first to Messrs. Lee, Bolton, & Lee, and since about 1877 to Messrs. Clutton, who act as agents for the plaintiffs. Messrs. Clutton had notice by the accounts, at any rate, from 1880, that the rents were paid by Cox's trustees. The plaintiffs themselves have produced accounts entitled "London Chapter Manor Accounts," which appear to shew that they had notice from 1877 that the rents were paid by the defendants Saunders and Hicks in respect of the estate of the late Mr. Cox. In 1889 a new steward of the manor was appointed, and he raised the question which has now to be determined. He took steps by proclamation and notice, dated January 12, 1893, which resulted in a seizure quousque on

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April 15, 1893, and the defendants Parr and Clark, the tenants of Cox's trustees, having refused attornment, this action was commenced on May 3, 1893, to recover possession of the land. The question is whether under these circumstances an admittance of the defendant Hicks in respect of the Sutton's Farm copyholds and of Saunders and Hicks in respect of the Mucking Hall Farm copyholds, or in respect of the copyholds of both farms, ought to be implied.

The effect of the authorities appears to me to be that acceptance of rent by the lord, in respect of copyholds, from a person paying it as heir or as surrenderee, if the lord knows that the rent is paid by such person as heir or as surrenderee, amounts to or implies an admittance of such person as tenant of such copyholds: Gilbert on Tenures, p. 282, 5th ed. p. 364; Calthrope on Copyholds (1635), p. 47; Watkins on Copyholds, p. 248, 4th ed. p. 306; Com. Dig. Copyhold, G, 4. I think that when the lord entrusts the general financial management of his property to an agent, and by the lord's authority a collector of the rents of a manor is appointed who accounts to that agent, and informs him of the rents paid and of the persons who pay those rents, the knowledge of the collector and agent must be regarded as the knowledge of the lord. Here the case is stronger, for the London Chapter Manor Accounts shew that the plaintiffs themselves had notice from 1877 that the rents were paid by the defendants Saunders and Hicks on behalf of the estate of Cox. Indeed, the very case made by the statement of claim is, that the rents have always been paid and accepted on the footing of copyhold tenancy by Cox's trustees.

In the case of the Mucking Hall Farm copyholds no actual surrender to the uses of Cox's will was necessary, and presentment could always be waived, so that nothing was wanting to put the trustees in possession as tenants but admittance; and on the other hand, until admittance they were not legally in possession as tenants nor liable as tenants for the quit-rents. The acceptance of the rent, with knowledge that Cox's trustees were in the position of devisees, and therefore of surrenderees, and liable only if admitted, implies assent by the lord to the surrender and is an admittance.

In the case of the Sutton's Farm copyholds it may be doubtful whether the legal position is quite the same, because the defendant Hicks, on the death of his father, succeeded to the possession of those copyholds as heir without admittance, and became liable for quit-rents, and was under no obligation to come in for admittance until required by the lord to do so, and no presentment or express notice of his father's death to the lord has been proved. Still I think that, as the quit-rents of the Sutton's Farm copyholds were accepted from him and Saunders as Cox's trustees, that involves sufficient notice to the plaintiffs that there had been a change in the tenancy, and that the rents were paid on that footing. Even if that is not the correct view as to the Sutton's Farm copyholds, I think that the plaintiffs are barred by the Statutes of Limitations. In *Lidiard's Case* (1), Kay, J., expressed an opinion that the statutes may apply to prevent a seizure quousque, and, notwithstanding Mr. Bosanquet's forcible argument, I incline to think that the time begins to run against the plaintiffs in favour of the heir, not from the date at which they had actually perfected their right to seize—that is to say, from the completion of proclamations or the service of notice—but from the time when they could have perfected the right had they known of the death of the father. A different view would make the Statutes of Limitations almost inoperative in cases of this kind. Even if the commencement of the time is to depend on knowledge, I think that, at any rate from 1877, the plaintiffs must be considered as having notice that the rents were no longer paid by the father and that a change in the tenancy had taken place. Ignorance that an event has happened, which has given a right of entry or action, does not in general prevent the commencement of a period of limitation; and in this case the event happened in 1868 or 1869, or, if proclamation was necessary at three annual courts then, in 1871.

For these reasons, I am of opinion that my judgment must be for the defendants.

Judgment for defendants.

The plaintiffs appealed.

(1) 42 Ch. D. 254.

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May 29. *Bosanquet, Q.C.*, and *Archibald Brown*, for the plaintiffs. There has been no admittance in this case; the acceptance of quit-rents only implies that the lord has expressed thereby his acquiescence in the tenancy, but this does not relieve the tenant from the obligation to submit himself personally and take admittance. The tenant must take the necessary steps to make his right complete. The fine on admittance may vary according as there are one or more tenants to be admitted, and until the lord knows who is coming in to be admitted he cannot assess the amount. In *North* v. *Strafford* (1) the fact that the lord had accepted the defendant was, for the purposes of recovering the fine, held to be no evidence of admittance, and the case illustrates the difference between the notification by the lord of his acceptance of the tenant and the admittance of the tenant at his own request. To complete the right of a new tenant there must be a surrender to the lord and admittance on it: Coke's Copyholder, ss. 38 and 41, and s. 18 of the supplement; *Vaughan* v. *Atkins* (2); *Holdfast* d. *Woollams* v. *Clapham* (3); *Brown* v. *Dyer*. (4)

The statements in the text-books that acceptance of rent by the lord amounts to an admittance are all based upon the report of the case of *Froswell* v. *Welch* in Godbolt. (5) That report is merely a short summary, like a head-note, of the effect of the case, which is reported more fully in Croke's reports (6) and in Bulstrode. (7) The doctrine relied on depends upon the existence of some act by the tenant importing that he submits to be a copyhold tenant, followed by some personal intervention of the lord importing the will of the lord to accept him as such copyhold tenant. Here there was no act amounting to a submission to be copyhold tenant. There was no production of the devise, which is the usual indicium of such submission in the case of devisees. An admittance cannot be implied from the act of the steward, for he can only act ministerially in the

(1) 3 P. Wms. 148.
(2) 5 Burr. 2765.
(3) 1 T. R. 600.
(4) 11 Mod. 73.
(5) Godb. 268.
(6) Sub nom. *Frosel* v. *Welsh*, Cro. Jac. 403.
(7) 3 Bulst. 214, sub nom. *Roswell* v. *Welsh*.

matter: *Rawlinson* v. *Greeves.* (1) Assuming that the receipt by the lord of rent paid to the steward would, if the lord knew that there had been a change of ownership, amount to an admittance, it is contended that there is nothing here to shew such knowledge on the part of the plaintiffs or their predecessors in title.

The plaintiffs' right is not barred by the Statute of Limitations. The period of limitation does not begin to run until there has been a dispossession or a right of action has accrued. The statute no doubt applies to copyholds, but its application as between persons claiming the copyhold differs from its application as between a copyholder and the lord. The statute does not begin to run against the lord before he can be considered as dispossessed. There is no dispossession of the lord's freehold, in respect of which he could bring ejectment, by reason of the death of a tenant. The right to seize the copyhold tenement quousque only arises when the three proclamations have been made or notice has been given to the tenant to come in and be admitted. When, after these preliminaries have been completed and a precept to seize has been issued, possession is refused, then, and not before, the lord's right of action to recover possession of the copyhold tenement can be said to arise.

[They cited on this point *Walters* v. *Webb* (2); *In re Lidiard and Jackson's and Broadley's Contract* (3); *Rains* v. *Buxton.* (4)]

Channell, Q.C., and *Godefroi*, for the defendants. It may be true that the doctrine of what is called "admittance by implication" arises entirely from the case of *Froswell* v. *Welch* (5) in Godbolt; but this doctrine has for more than 200 years been stated to be the law in all the books of authority relating to copyholds: such as Calthrope, published in 1635, Gilbert on Tenures, Watkins on Copyholds, and others, and it is submitted that it must now be taken to be the law. The passages in these works relating to the subject base the doctrine on the principle that the copyholder's tenure depended on the will of the lord,

(1) 3 Buls. 237; Poph. 127, sub nom. *Rawlinson* v. *Green*; Bridg. 81, sub nom. *Robinson* v. *Greves.*

(2) Law Rep. 5 Ch. 531.

(3) 42 Ch. D. 254.

(4) 14 Ch. D. 537.

(5) Godb. 268.

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and that his recognition of the copyhold tenant as such amounted to an admittance. See the passage in Gilbert on Tenures, 5th ed. pp. 360–364. The result of the authorities is that though mere acceptance of rent does not amount to an admittance, the case is otherwise where there is acceptance of rent by the lord from a person as if from a copyholder, because that imports the assent of the lord that the person paying should be the copyhold tenant. Such assent is the substance of admittance; the entry on the roll is merely the record of it. See also 1 Watkins on Copyholds, 4th ed. p. 327.

From the report of the case of *Froswell* v. *Welch* (1) in Bulstrode, it appears that in that case the defendant failed because he did not shew that the lord accepted the rent from him as copyholder; but the report contains a dictum, which the other reports treat as being the point decided, to the effect that receipt of rent as from the copyholder will amount to admittance; and the dictum has been accepted as law in all the text-books. It is contended, therefore, that the established doctrine of law as appearing from the authorities is that anything which imports the assent of the lord to a copyhold tenancy amounts to an admittance. See Com. Dig. tit. Copyhold, Admittance, G. 4, Bac. Abridg. tit. Copyholds, G. 6. It may be that, as between the tenant and a person other than the lord, the only proper evidence of admittance is the record of it on the rolls; but as between the lord and the tenant the admittance is complete by the assent of the lord. The steward is the regular deputy of the lord and his general agent for the purpose of the expression of his will with regard to the copyhold tenements of the manor; and the lord is therefore bound by the steward's act in accepting the rent. See 1 Watkins on Copyholds, 4th ed. p. 313, where it is stated that the lord or his steward may admit as well out of court as in. See also Com. Dig. tit. Copyhold, Admittance, G. 6; *Dudfield* v. *Andrews* (2); Scriven on Copyhold, 4th ed. p. 112.

In this case the lords have received the rent paid to the steward knowing of the death of the former copyhold tenant, and therefore must be taken to have ratified the acts of the

(1) 3 Bulst. 214. (2) 1 Salk. 184.

steward, and assented to the defendants being the copyhold tenants.

As to the Statute of Limitations, the right of the lord is not to go on the land and take possession, but he must take proceedings to obtain possession, and notice or proclamation are part of the machinery for taking possession. The substantial cause of action is the non-existence of a tenant, and the statute begins to run when that state of things arises—that is, from the death of the last tenant: *In re Lidiard and Jackson's and Broadley's Contract* (1); *Doe* d. *Tarrant* v. *Hellier* (2).

Bosanquet, Q.C., in reply.

LORD ESHER, M.R. In this case the plaintiffs are lords of a manor, and they have brought an action of ejectment against the defendants, of whom two are the real defendants, on the ground that those defendants were by proper means called on to come in to be admitted tenants of the manor and that they refused; and that thereupon the right accrued to the plaintiffs to maintain this action to enforce their claim to take possession of the copyhold premises till the defendants submitted to do certain things.

The answer of the defendants is that the legal ground for such an action fails because they have already been admitted. It cannot be denied that the defendants have not been admitted to be tenants of the manor by admission in court, and according to all the formalities which in old time at all events were necessary. The case of the defendants is, that although not on the roll of the manor, they have been admitted as tenants of the manor by a means known to the law, and are tenants of the manor, not merely as against other persons, but as against the lords of the manor.

The admittance alleged is one by necessary legal implication by reason of acts done within the manor, though not in court, and it is said that the facts which are required by law to create such a necessary legal implication are these: That the persons seeking to raise the implication should be entitled to the premises; that they have taken possession of them; that they have paid the quit-rents which they would have had to pay if they had been admitted in the strictest manner and paid them

(1) 42 Ch. D. 254. (2) 3 T. R. 162.

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as quit-rents to the steward or collector authorized to receive them; and that either the steward or the lord of the manor knew that they were paid as quit-rents. In such circumstances it is said that the law implies that the persons in possession are legal tenants of the manor as against the lords of the manor as well as against other persons.

It is said this was decided in *Froswell* v. *Welch.* (1) If that case stood alone, upon the report of the case it might be doubted whether it had so held; but from the time when that case was decided until now, in all the text-books which are, in a sense that I will presently explain, authoritative, and in the subsequent judgments, that case has been treated as a decision to the effect that I have stated.

Text-books are, of course, not binding authorities on the Court, but there are some of them which have been by general consent treated as what I may call guiding authorities, and, among these, Gilbert on Tenures, Watkins on Copyholds, and Scriven on Copyhold, have been so treated by all lawyers from the time they were written, and it would be insensible for a Court dealing with copyhold law not to be guided by those authorities. It seems to me that, according to those books, for more than 200 years it has been an admitted rule of copyhold law that there can be a valid admittance of a proper person to be a tenant of a manor, although what was done was done out of court and the name of such person is not, in fact, on the court roll. I cannot doubt that the passages read to us from the authorities I have mentioned are decisive on the point. I rather think that the case is most clearly stated in Gilbert on Tenures, at p. 364, thus: "There are cases of admittances by construction and implication, without any express admittance; and as the last case is reported by Rolls, it is said that the acceptance of rent out of court by the cestuy que use (the lord knowing of the surrender), is an admittance in law." The author goes on to speak of the reason of the thing; but I confess that, after this lapse of time I do not care to inquire into the reason for that which has been admitted to be law for all these years. The passages read from the other authors are to the like effect, and we ought to

(1) Godb. 268.

determine now, even if this were the first judicial decision to that effect, that there can be an admittance on land made out of the court of the manor.

I think, however, that in order that the law may be applied to a particular case, certain things must be shewn by the person seeking to raise the implication. Those facts are: a right to be admitted on the roll; the payment of quit-rents which could only be enforced against a tenant of the manor; the payment of such rents as quit-rents; and knowledge by the lord of the manor, or some one whose knowledge will bind him, that the rents were paid as quit-rents, as if by a tenant of the manor.

The question whether the knowledge of the steward will be sufficient depends upon the authority of the steward in respect of admittances. It might be said that the steward is only authorized to admit a tenant in court; but by universal practice the authority of the steward is recognised to admit proper persons, as tenants of the manor, by any of the ordinary modes of admittance. For 200 years or more, one of the modes of admission has been by implied admittance, that is, by implication from such circumstances as I have stated, and therefore such a method of admittance is within the authority of the steward. The steward, however, must exercise this authority in the same manner as if the lord himself were making the admittance, that is, with knowledge of the circumstances. The steward must therefore know that the money he receives is paid as quit-rent for the premises in respect of which the person who pays the money has a right of admittance.

That being, as I apprehend, the law, there arises the question whether the facts of this case bring it within that law. [His lordship then examined the facts of the case, and continued:—] It seems to me that all the facts which are necessary to give rise to the legal implication are present, and that the defendants were, in contemplation of law, admitted to be tenants of the manor. The defendants are therefore right in saying that the lord of the manor cannot maintain an action of ejectment based on the ground that they ought to come in and be admitted.

There is an alternative defence which has been elaborately argued, and upon which I think we ought to give our opinion.

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In dealing with the Statute of Limitations we must do so upon the assumption that if it were not for the statute the action could be maintained. The last Statute of Limitations is the 37 & 38 Vict. c. 57, which enacts by s. 1: "After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims." This action is one to recover possession of land, though, no doubt, for a limited purpose and for a limited time, so that the case is within the Statute of Limitations, as indeed has been held. The question therefore arises whether the time has elapsed within which such an action must be brought: or, in other words, the question is, when first had the plaintiffs a right to enter into this land, or to bring an action to recover possession of it? That depends upon whether they had a right to make an entry without having issued three proclamations, or without having given a specific notice. If giving the notice or making the proclamations were mere procedure to enforce a right of entry, the statute would run from the time when the legal right of entry arose. The law upon this point seems to me to be more fully considered in the case of *Doe* d. *Bover* v. *Trueman* (1) than in any of the other cases that have been cited. Bayley, J., says, in that case, at p. 746 of the report: "The next question is, whether three proclamations were necessary to entitle the lessor of the plaintiff to seize the copyhold? When a copyholder dies, it appears from all the authorities that notice should be given that the heir is to come in and be admitted. There is no case or dictum to shew that the mere neglect to appear at the first court after the death of the copyholder will entitle the lord to seize. Indeed such a right would be contrary to that rule of law, which says, that the heir may maintain an ejectment without admittance. Such a right in the heir has never been limited to ejectment brought before the first court. But if the lord could enter after the first court without more being done that would shew the legal title to be in him; whereas, by the generally received opinion as

(1) 1 B. & Ad. 736.

to the right of the heir, the legal estate is in the latter." Upon that ground he defeated the claim of the lords of the manor because they desired to take possession before the three proclamations. So, later on in his judgment, at p. 750, he says: "In Jacob's Court Keeper, p. 13, it is said: Upon the descent of any copyhold of inheritance, the heir is tied upon three several proclamations made at three several courts, to come in and be admitted to his copyhold. If he faileth to come, this failure works a forfeiture." In other words, it seems to me there is no forfeiture, nothing upon which an action of ejectment against the right heir can be maintained, unless there have been three proclamations; or unless, as it is afterwards put, there is express notice to the heir to come in. If that is so it is the refusal to come in which works a forfeiture. Even after the proclamations or notice, as the case goes on to point out, there is no forfeiture unless it be shewn that the heir has refused to come in. It is his refusal to come which works the forfeiture, and thus there is no cause of action until such refusal. If so the Statute of Limitations against a right of entry, or against a right to bring the action, only lies between the time when the cause of action arises and the time when the action is brought; that is to say, between the time when, after proclamation or notice, the heir has refused to come in, and the time when the action for ejectment is brought. If that is so, of course the twelve years have not run out in this case. It was suggested that such a state of the law would work a great hardship. That though a weak argument is an argument and an observation that one is anxious to get rid of. The answer to it has been given by the plaintiff's counsel that there is, in fact, no hardship upon the tenant because, during all the years in which the landlord chooses to delay bringing an action—that is, an action as in this case, on the ground that the tenant has not come in to be admitted—the tenant has the money in his own possession, and it is no hardship upon him that a claim for payment of a fine should be delayed, and further during those years the tenant has possession. Even if there were a hardship we should be bound to act upon the law, but it is satisfactory to think that the law has not produced the hardship alleged.

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I think, therefore, for these reasons the Statute of Limitations was no answer to the plaintiff's claim, and that actions of ejectment quousque brought under the copyhold law are not barred by the Statute of Limitations except from the time after proclamation or notice and refusal by the tenant to comply.

The appeal, however, fails upon the first ground with which I have dealt, and must be dismissed.

KAY, L.J. I entirely agree with the judgment of the Master of the Rolls; but as the case is of considerable importance as to the law of real property, I think it right to express my view in my own words. [The Lord Justice, after dealing with the facts of the case, continued:—] The defences in this case are twofold. First of all it is said there was an implied admittance of the defendants, and next that the action is barred by the Statute of Limitations.

I will deal first with the case of the Statute of Limitations. Some reliance has been placed upon words used by me in *In re Lidiard and Jackson's and Broadley's Contract.* (1) In that case a point of this kind arose more than seventy years after the last intimation on the court rolls of the property in question being copyhold. During those seventy years it had been dealt with by the persons in possession conveying it as freehold land, with some exceptions that did not seem to me to be material. The case was decided upon the ground that after so long a time, and after the dealings with the property during those seventy years, it must be presumed against the lord that there had been an enfranchisement. Incidentally the other question was raised, and in the report, which I have no doubt is perfectly accurate, the language that I appear to have used is thus stated at p. 257: "The question which I have to determine, in effect is whether the lord can insist on this being treated as copyhold land. The only remedy of the lord would have been by seizure quousque, and the only way in which he could have done that was by having proclamations made at three successive courts of the manor, and then entering and seizing upon the land until the proper tenant came in, after the death which took place in 1819. Those

(1) 42 Ch. D. 254.

proceedings ought to have taken place, if at all, within a reasonable time after the death, and the lapse of seventy years from that time to this would make such an entry as that a very extraordinary proceeding. The question is—and it is a question upon which no direct authorities have been produced—whether such an entry as that is an entry such as is spoken of in the 2nd section of 3 & 4 Will. 4, c. 27, an entry which under that Act could only be made within twenty years, and could only now under the later Act of 37 & 38 Vict. c. 57, be made within twelve years. In the absence of authority, I should think that it was. Copyholds are within the Act of Will. 4, being expressly mentioned in the interpretation clause (s. 1), and therefore an entry as to copyholds is one of the things which the Act says must be made within the twenty years. Therefore, if that point arises in this case, I should be inclined to hold that such an entry could not be made on land after the lapse of seventy years, but that the lord was bound long before that time had elapsed to make proclamation and seize quousque if he meant to do so at all."

That point has been most ably argued in the case before us, and I have had an opportunity of reconsidering the matter, and I have now come to a different conclusion, and for this reason. The statute of 3 & 4 Wm. 4, which has now to be read with the later Act that has altered the time from twenty to twelve years, provides that "land" in the Act shall include copyholds, and the effect of s. 9 of 37 & 38 Vict. c. 57 is that copyhold is included in the word "land" in that Act as in the former one.

The question is when the right to make an entry or bring an action first accrued. It has been argued, and I suppose that is the view which impressed me on the former occasion, that the right to make an entry, at any rate, accrued when the copyhold tenancy became vacant, and that the making of proclamations, or giving notice, are only machinery to obtain entry. Is that so? As to an action, it could not be brought until after notice given or proclamations made, and the tenant has refused or declined to come in. The passage read by the Master of the Rolls is, I think, conclusive upon this point. Until such refusal there is no forfeiture; and, therefore, upon further consideration, I have come to the conclusion that until such refusal there is no

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right of entry or right of action on the part of the lord to seize the land quousque in order to compel the tenant to come in to be admitted.

I think that the answer to the suggestion of possible hardship which might arise if such were the state of the law was very forcible. It was pointed out that the tenant in such a case as the present has been in possession of the land, and has in fact had the advantage of the delay of the lord in calling on him to be admitted and pay the fine.

This question does not really arise in the present case if we come to the conclusion that there has been an admittance. It was decided in *Froswell* v. *Welch* (1) some 270 years ago that there may be an implied admittance by the lord of a person who is entitled to be admitted to a copyhold tenement by treating him as a copyhold tenant in various ways, and, amongst others, by receiving the quit-rent from him. The lord is not entitled to have any quit-rent from such a person until he has been admitted. The admittance may be made by the lord in court or out of court by any distinct intimation of his will that the copyholder should be admitted. The entry on the court rolls is no part of the admittance, but follows upon it, and is a record of what has been done. The admittance is complete and perfect as between the lord and the tenant when the lord has unequivocally expressed his will that the tenant shall be admitted. I take the summary of the law from Rolle's Abridgment (Copyholds), p. 505, pl. x.: "If a copyholder surrenders to the use of another, and then the lord, having knowledge of that, accepts the rent of the cestui que use out of court, that is an admittance in law." That statement of the decision in *Froswell* v. *Welch* (1) has been repeated in all the principal text-books from that time to the present, and I agree that, even if upon a careful consideration of that case, it should be found that the statement is not borne out by the authority cited in support of it, still it would be wrong for any Court after such a lapse of time to treat it as otherwise than the true effect of that decision. *Froswell* v. *Welch* (1) is reported in various reports. The reports do not altogether agree, for some seem to state the doctrine in rather wider terms than others do.

(1) Godb. 268.

I think the report most relied on by those who are contending now that there was an implied admittance is that in Bulstrode; but the summary of them all is in Rolle's Abridgment in the words I have read, and I accept that as being the law.

If the law is as I have stated it, in my opinion the facts which I have stated with some particularity bring this case within it, and I agree that the appeal fails and should be dismissed.

A. L. SMITH, L.J. I agree with the judgments of my Lord and the Lord Justice, and I will shortly state how the case strikes me.

From the years 1868 and 1870 respectively, down to 1893, the lords of the manor had no name of any living person on the roll in respect of these two copyholds. They however received quit-rents during this time, certainly from 1875, from the defendants in respect of these copyholds. In 1893 they issued two proclamations, and then gave a notice in place of a third proclamation, and thereupon brought this action on the ground that the lords are entitled to seize quousque because they are without tenants of the copyholds. The answer of the defendants is that it is not true to say that there are no tenants, because they the defendants were admitted either in 1875 or 1877, or at all events in 1880. The defendants do not say that they were admitted upon the court roll, but that they have been admitted by implication, and if this is not so that the action is brought more than twelve years after the cause of action accrued. It was at one time in the argument suggested that as between the lord and the copyholder there could be no such thing as an admittance by implication. Authorities were cited beginning with *Froswell* v. *Welch* (1), and the text-writers since that date were quoted. The suggestion was that inasmuch as there could not be found a case in which the lord was suing in ejectment, having seized quousque, in which the defence of admittance by implication was raised, therefore there was no such thing known to the law. Having heard the text-books cited, and the few cases upon the subject, I am clear that for two centuries and more it has been accepted law, that a state of circumstances may exist between a lord of the

(1) Godb. 268.

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manor and a tenant which raises the necessary implication that the tenant has been admitted out of Court.

That being the law which has been accepted for so long a time it cannot now be disputed, and the question comes to this, whether the facts of the case shew that the defendants can make out—and I agree that it is for them to make it out—that there has been what is known as an admittance by implication in this case. If a lord receives quit-rents, from time to time, from a person in possession of copyholds, knowing such payment is made on account of such possession, in my judgment the implication arises that the lord has admitted such person, as copyhold tenant, to the tenements in respect of which the quit-rents are paid, for in no other way can the lord's right to receive such quit-rents be accounted for. There is therefore a good defence to this action, and the appeal fails.

Upon the point arising under the Statute of Limitations I say that until the lord gets the tenant in the wrong by reason of his not coming in to be admitted after proclamation, or notice in lieu thereof, the right of action does not accrue, and until then the statute does not commence to run.

Upon the first point I think the judgment appealed from was right, and that this appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *F. A. Manley.*

Solicitors for defendants: *Hicks & Son.*

A. M.

BARBER *v.* BURT AND OTHERS.

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June 11.

County Court—Appeal—Judge's Note—Costs—Shorthand Note—Practice of City of London Court—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *s.* 121.

On the hearing of an appeal from the City of London Court in a case tried with a jury, the appellant used a shorthand note of the evidence and the summing-up. A new trial was ordered on the ground of misdirection. The practice of the City of London Court, as stated by the judge, is that the Corporation employ a shorthand writer to take a note of the proceedings, and the parties can obtain a transcript of the shorthand note on payment.

On an application by the appellant for the costs of the shorthand note:—

Held, that, as the case was one in which it was impossible to request the judge to make a note at the time when the point on which the appeal was decided arose, because the point did not arise until after the close of the summing-up, the judge was not bound, under s. 121 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), to furnish a copy of his note, and the appellant was therefore entitled to obtain and use the transcript of the shorthand note, and the costs ought to be allowed, but only the costs of so much of the note as was necessary, that in the present case a note of the evidence was necessary, but that as a general rule, in cases tried with a jury, where it is necessary to use a transcript of the shorthand note, only the costs of the note of the summing-up ought to be allowed.

APPLICATION by the plaintiff, that the costs of a transcript of a shorthand note of the evidence given at the trial, and of the judge's summing-up, which had been used on the hearing of an appeal from the City of London Court, might be allowed to the plaintiff as part of the costs given in his favour.

The action was brought under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), and was tried in the City of London Court before the deputy judge and a jury, when a verdict was given for the defendants. The plaintiff appealed, and the appeal was heard by a Divisional Court, who allowed the appeal with costs, and ordered a new trial. The plaintiff applied for the costs of the shorthand note. The Court did not then allow those costs, but gave special leave that the case might be put in the list again for the purpose of the present application.

The judge of the City of London Court had made a statement as to the practice of that Court for the information of the judges of the High Court. That statement shewed the practice to be as follows: The judge makes a note of any question of law,

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and of the facts in evidence in relation thereto, when required to do so under the County Courts Act, 1888. (1) In addition to this, in all cases the Corporation of the City of London employ a shorthand writer to attend the sittings of the Court, and take a note of the proceedings, and a transcript of the whole or a part of such shorthand note is furnished on payment to suitors requiring it for the purpose of appeals. In the present case the order for a new trial was made on the ground of misdirection, and the plaintiff had obtained and had used on the hearing of the appeal a transcript of the shorthand note of the whole of the evidence and of the deputy judge's summing-up.

W. M. Thompson, for the plaintiff, in support of the application. The plaintiff ought to be allowed the costs of these shorthand notes. The case was not one in which the judge had at the request of either party made a note of any question of law raised, and of the facts and evidence, and of his decision, and therefore s. 121 of the County Courts Act, 1888, has no application. A note could not have been asked for under that section, for the point on which the Divisional Court decided the appeal

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 120: "At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter."

Sect. 121: "In any action or matter, in which there is a right of appeal, and the judge has at the request of either party made a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the action or matter, he shall, at the expense of any person or persons being party or parties in any such action or matter, furnish a copy of the note so taken at the said trial or hearing, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, whether a notice of motion in the matter of the said appeal has been served or not, and the copy so signed shall be used and received at the hearing of such appeal."

By the Rules of the Supreme Court, 1883, Order LIX., r. 8: "On any motion by way of appeal from an inferior court, the Court to which any such appeal may be brought shall have power, if the notes of the judge of such inferior court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such judge which the Court may deem sufficient."

could not arise until after the close of the evidence and the summing-up. The note was properly taken, in accordance with the practice of the Court, as stated by the judge, and was necessary for the hearing of the appeal.

Rose-Innes, for the defendant. The plaintiff has not adopted the proper course. He ought to have applied for a note signed by the judge under the Act of 1888, and the shorthand note ought not to have been used: *Baker* v. *Fraser*. (1) The practice, as stated by the judge, is not warranted by the statute, or by the rules dealing with county court appeals: Rules of the Supreme Court, 1883, Order LIX., rr. 8, 17. In any case, a note of the whole evidence was unnecessary. A note of the summing-up would have been sufficient, and the remainder of the costs ought not to be allowed.

CAVE, J. I am of opinion that this application ought to be granted. The case is one in which it was impossible to ask for a note at the time when the point arose which afterwards became the subject of the decision of the Divisional Court, for the point did not arise until after all the evidence in the case had been given and the summing-up was concluded. We are informed that the practice of the City of London Court is that in all cases a shorthand note of the evidence and the summing-up is provided by the Corporation of the City of London. In cases where that note is allowed to be used, I am of opinion that the note of the summing-up does not require to be signed by the judge. In an ordinary case I should say that a shorthand note of the summing-up would be sufficient; but in the present case the point raised was not so easy to deal with, for a note of the evidence of the plaintiff and of some of the other witnesses was necessary. It is true that some part of the shorthand note may not be useful for the purpose of the decision, but that point does not arise here. It was contended on behalf of the defendants, that costs of shorthand notes ought not to be allowed at all in appeals from county courts; but the case which was cited in support of that contention, *Baker* v. *Fraser* (1), was decided at a time when the practice prevailing in

(1) 9 Times L. R. 237.

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BARBER v. BUNT.

Cave, J.

the City of London Court was not fully understood. If a note had been taken by the judge in this case, we should not have allowed the costs of these shorthand notes; but here no note was taken by the judge, and he was not bound under the circumstances to take a note. In the present case, therefore, the plaintiff is entitled to the costs of some portion, at any rate, of the shorthand note which was taken. If any portion of the shorthand note were shewn to be unnecessary, I should be inclined to disallow the costs of that portion; but there is nothing to shew that this was the case here. The practice, as I have stated it, must be taken as applying only in cases where no note is taken by the judge; and only the costs of so much of the shorthand note as is material to the point raised by the appeal are to be allowed.

COLLINS, J., concurred.

Application granted.

Solicitor for plaintiff: *J. S. Merton.*

Solicitor for defendants: *H. A. Graham.*

P. B. H.

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June 6, 20.

THE QUEEN *v.* JUDGE OF COUNTY COURT OF OXFORDSHIRE.

County Court—Practice—Solicitor—Clerk—Right of Audience—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 72.

Where a solicitor, retained by a party to an action in the county court, instructs his clerk to appear and conduct the proceedings in court on the client's behalf, such clerk, although he be a duly qualified solicitor and has had the general management of the proceedings in the action for the client, is not "a solicitor acting generally in the action" for the client within the meaning of s. 72 of the County Courts Act, 1888, and is not entitled to address the Court without the leave of the judge.

RULE calling upon a county court judge to shew cause why he should not hear the applicant as solicitor for one of the parties to an action in such court.

In January, 1894, an action of *Simmonds* v. *Turner* was brought in the county court of Oxfordshire holden at Oxford. Messrs. Thomas Mallam & Co., being the solicitors retained by the defendant, instructed their managing clerk—a Mr. Addison—

to appear and represent the defendant Turner at the hearing, which he accordingly did, when judgment was given for the defendant. At the following county court, on February 22, the plaintiff applied for a new trial, when Mr. Addison, by the instructions of his principals and with the assent of the defendant, again appeared and claimed as of right to address the Court on behalf of the defendant in opposition to the said application. The judge held that he was not entitled to address the Court as of right, but only by leave, which he offered to give him: such leave, however, Mr. Addison refused to accept. The judge accordingly adjourned the further hearing of the application until a decision of the High Court upon the matter could be obtained. Mr. Addison, who was in the permanent and exclusive employment of Messrs. Thomas Mallam & Co., was a duly qualified solicitor, had renewed his annual certificate for the current year, and had duly signed the roll of solicitors practising in the said county court. He had had the entire management of the proceedings in the action on behalf of the defendant from the commencement. But the judge found as a fact that he was not the "solicitor acting generally in the action for the defendant. (1) A rule having been obtained in the High Court calling on the county court judge to shew cause why he should not hear Mr. Addison;

H. Sutton, for the county court judge, shewed cause. It is essential to a solicitor's right of audience, on behalf of a party to any action or matter, that the relationship of solicitor and client should exist between him and such party. It was so held by Lord Cairns, L.J., in *Ex parte Broadhouse* (2), which was a case decided under the Bankruptcy Act, 1861. By

(1) By s. 72 of the County Courts Act, 1888: "It shall be lawful for any party to an action or matter, or for a solicitor being a solicitor acting generally in the action or matter for such party, but not a solicitor retained as an advocate by such first-mentioned solicitor, or for a barrister retained by or on behalf of any party on either side, but without any right of exclusive audience, or by leave of the judge for any other person allowed by the judge to appear instead of any party, to address the Court . . . . the right of a solicitor to address the Court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor."

(2) Law Rep. 2 Ch. 655.

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that Act it was provided that "every solicitor admitted as a solicitor of the Court of Bankruptcy, as to all matters before the commissioners, may appear and plead without being required to employ counsel." But it was held those words did not include a person who, although a duly qualified solicitor, was not the solicitor of the party for whom he appeared, but only the clerk of such solicitor, the necessary privity being wanting.

In the present case, Messrs. Mallam & Co. were the defendant's solicitors, and Mr. Addison was not his solicitor. For a party cannot at the same time, and in respect of the same matter, have more than one solicitor: per Blackburn, J., in *Reg.* v. *Spooner.* (1) The county court judge has found as a fact that Mr. Addison was not the "solicitor acting generally in the action" for the defendant, and that is a question of fact for the judge to determine: *Ex parte Rogers.* (2) That case was decided under the earlier County Courts Act of 1852. But the words of that Act and of the Act of 1888 are practically the same, with the exception that in the latter Act is introduced a new clause to the effect that "the right of a solicitor to address the Court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor." But that clause does not give the solicitor any new right of audience; it merely negatives the exclusion in certain circumstances of a right already given. In *Ex parte Rogers* (2), Montague Smith, J., had said obiter that "If he (the applicant) was acting as attorney generally in the action, the fact of his being clerk to another attorney would not preclude his right to be heard." And the new clause was merely intended to give statutory effect to that dictum. It was meant to apply to the case of a clerk who was allowed by his employers to appear for a client of his own. The words "exclusive employment" mean that he must not be employed at the same time by more than one solicitor; they do not mean that he must be employed on the terms of not taking private practice.

Sir R. Webster, Q.C. (*F. W. Hollams,* with him), in support of the rule. Mr. Addison had the sole and entire management of the proceedings in the action for the defendant, and he was a qualified solicitor—therefore he was "a solicitor acting generally

(1) 18 L. T. (N.S.) 325. (2) Law Rep. 3 C. P. 490.

in the action" for the defendant within the meaning of s. 72. The case of *Ex parte Rogers* (1) is no authority against this view. In that case the applicant had had nothing to do with the proceedings in the action until the very day of the hearing, when he was instructed to appear and conduct the action. It was clear, therefore, that he could not bring himself within the description of an attorney acting generally in the action for the party. If the county court judge here was right, the words "solicitor acting generally in the action or matter for such party" mean nothing more than "solicitor for such party," i.e., the solicitor retained by the party; and the words "acting generally in the action or matter" ought to have been omitted not merely as superfluous, but as unmeaning. The contention of the other side that the new clause in s. 72 was intended to apply to the case of a clerk who acted for private clients of his own is untenable, for it supposes a condition of things which in practice never exists. A salaried clerk is, of course, bound to give the whole of his time to the service of his employer.

Cur. adv. vult.

June 20. COLLINS, J. My brother Cave has asked me to read my judgment first. This is an order calling upon the judge of the county court of Oxfordshire to shew cause why he should not hear one Arthur Addison, a solicitor of the Supreme Court, and claiming to appear and address the Court on behalf of one Silas Turner, the defendant in an action in the said county court. Mr. Addison is a fully qualified solicitor, and is the managing clerk of Messrs. Mallam & Co., who were the solicitors retained by the defendant in the action. At the hearing on January 25 he, as he states in paragraph 1 of the affidavit on which the order was obtained, "on the instructions of his principals, the above-named Messrs. Mallam & Co., appeared for the defendant," in whose favour the action was decided, and again, on February 22, he appeared to oppose a new trial "by the direction of his employers, the said Messrs. Mallam & Co., and with the assent of the said defendant." He further avers

(1) Law Rep. 3 C. P. 490.

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that he has had the entire management on behalf of the defendant of the proceedings in the action from the commencement. It was on this last occasion, viz., February 22, on the motion for the new trial, that the question for our decision arose. Mr. Addison then claimed to be heard as of right to shew cause on behalf of the defendant; and the learned county court judge, while offering to hear him by leave, declined to admit his claim to be heard as of right. The learned county court judge finds as a fact—and this was a matter of fact for his decision: *Ex parte Rogers* (1)—that Mr. Addison was not the solicitor acting generally in the action for the defendant, and that the firm of Mallam & Co. were the solicitors so acting. The question turns upon the 72nd section of the County Courts Act, 1888, which runs as follows: "It shall be lawful for any party to an action or matter, or for a solicitor being a solicitor acting generally in the action or matter for such party, but not a solicitor retained as an advocate by such first-mentioned solicitor, or for a barrister retained by or on behalf of any party on either side, but without any right of exclusive audience, or by leave of the judge for any other person allowed by the judge to appear instead of any party, to address the Court, but subject to such regulations as the judge may from time to time prescribe for the orderly transaction of the business of the Court, *the right of a solicitor to address the Court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor.*" The question is whether, under the provisions of the above section, and on the facts as found by the learned judge, Mr. Addison was entitled as of right to be heard. The learned judge has held that he was not. With the exception of the concluding words in italics the section is identical with that of the earlier Act, viz., 15 & 16 Vict. c. 54, s. 10. Sir R. Webster, who argued for Mr. Addison, did not indeed admit that under the former Act his client would have had no right of audience, but his main contention was that the new words at all events made it clear that the right now existed. It is to be observed that the new words do not in terms confer any right on any person not theretofore entitled; they merely provide for the

(1) Law Rep. 3 C. P. 490.

removal of a possible bar to a right otherwise complete. This throws us back on the first part of the section to see whether it conferred a primâ facie right on Mr. Addison to address the Court. If so, he was not disabled from exercising such right by the fact that he was in the permanent and exclusive employment of Messrs. Mallam & Co. What, then, is the standard laid down by the section by which to determine whether a solicitor is entitled to address the Court? It is, that he must be "a solicitor acting generally in the action or matter for a party to the action or matter." Does this embrace a solicitor who is not retained by the party, but who appears only as the servant or agent of the solicitor or firm so retained under orders received from him or them? There is weighty authority under the former statute that it did not. "There can," says Blackburn, J., dealing with the same words in *Reg.* v. *Spooner* (1), "only be one attorney for a party at a time"; and in *Ex parte Rogers* (2), Montague Smith, J., says, "under 15 & 16 Vict. c. 54, the only attorney who is entitled to be heard in the county court is *the* attorney acting generally in the action for the party." "If he was acting as attorney generally in the action the fact of his being clerk to another attorney would not preclude his right to be heard. But the matter of fact was for the consideration and determination of the learned judge. If he found that he was not acting as *the* attorney generally in the action his refusal to hear him was quite right." Bovill, C.J., with whom Willes, J., concurred, clearly explains the circumstances which would under that statute have entitled a managing clerk to audience. He says: "Although it turns out that the point is not raised by the affidavit on which the rule is founded, I think it right to say that in my opinion there is nothing in the fact of a gentleman being the clerk to another to prevent his being heard as *the* attorney in the cause. He must, however, satisfy the requirement of the statute by shewing that he is the attorney acting generally in the cause" . . . "Who is to determine whether or not the attorney is acting generally in the action? The judge before whom the party appears has the best means of determining that question, . . . he seems to

(1) 18 L. T. (N.S.) 325. (2) Law Rep. 3 C. P. 490.

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have held that Mr. Rogers was acting merely as clerk to Mr. Stenning and was not engaged generally as attorney in the cause." It is obvious, therefore, that the judges in that case thought that though a managing clerk might be retained by and act for the party generally in the action, it would be a question of fact whether he was really acting as such or merely as clerk for somebody else, and that both the principal and the clerk could not at the same time be the attorney acting generally in the action. But it is suggested that all these learned judges did not realize or remember that the words of the statute are "an attorney," and not "the attorney" acting generally in the action. Bovill, C.J., begins, however, by quoting the exact words of the statute, and it seems clear to me that they must have been present to the mind of all the judges. I think the indefinite article is used in the statute because it is dealing with any action and any party to an action and with any one of a certain class, viz., solicitors and barristers, and the indefinite article is therefore more appropriate; but when in a given case a solicitor or firm of solicitors is retained he or it becomes the solicitor or firm of solicitors acting generally in the action or matter. I think a solicitor cannot be said to be a solicitor acting generally in the action or matter for a party unless the relation of solicitor and client exist between him and such party. It may well be that when a firm is retained each member of the firm may be described as *a* solicitor acting generally in the action for the party who retains him; but I think the same could not be said of a managing clerk who was not retained. The position of a managing clerk when held by a solicitor, though it does not exclude him, does not qualify him to claim audience. That must depend, I think, on whether he is found as a fact to be a solicitor retained by a party and acting generally for him in the action or matter. I think the observations of Lord Cairns in *Ex parte Broadhouse* (1) are applicable to this case. In speaking of sect. 212 of the Bankruptcy Act, 1861, which authorized solicitors to appear and plead without employing counsel, he says: "That section did not in any way alter the ordinary character in which alone a solicitor is entitled to appear in any Court, viz., as

(1) Law Rep. 2 Ch. 655, at p. 658.

solicitor for a particular client. His appearing in that character is the condition of his being heard, and for obvious reasons. The main object of allowing and favouring the appearance of a solicitor as representing another person is that the Court should have before it a person who, on the one hand, is under an obligation to the Court, because he is one of its officers, and on the other hand is under an obligation to the suitor, *because he is in privity with him*, and is the actual person who represents him. Unless that chain of connection is maintained and kept complete, the object of allowing solicitors to appear on behalf of other parties is entirely defeated." Acting upon this view, the Court (Lord Cairns and Rolt, L.JJ.) upheld the refusal of the commissioners to hear a gentleman whose position was very similar to that of Mr. Addison in this case, viz., a qualified solicitor acting as managing clerk for the firm actually retained. I think the standard by which the Court tried the right of audience in that case was virtually the same as that laid down by the statute in the case before us. The test put by Lord Cairns was, Is the person who claims audience the solicitor of a particular client? The condition required by the statute is that he shall be "a solicitor acting generally for a party in the action or matter"; and it seems to me that the same reasons which prevented him from having audience in that case as solicitor for the bankrupt would prevent him from having audience in this case as a solicitor acting generally for the defendant in the action. In both cases the objection of want of privity between him and the client equally applies. The only difference between the two cases lies in the use of the indefinite article in the statute which I have already considered. I think the legislature cannot have intended merely by using the indefinite instead of the definite article to create a class of advocates open to the objections pointed out by Lord Cairns. If this is the proper view of the words "a solicitor acting generally in the action or matter for such party," have the added words of the new section altered the law? I think not. I think they only remove a possible doubt and expressly enact the proposition covered by the semble in *Ex parte Rogers* (1), viz., that the fact that a qualified solicitor is managing clerk to

(1) Law Rep. 3 C. P. 490.

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some one else shall not of itself prevent him from having audience as solicitor for a party, provided he can shew that he is such solicitor, which in this case he cannot. This is the view taken by Judge Heywood in his able work, Annual County Court Practice, 1894, p. 236, and by the learned judge in this case, with the conclusion and reasoning of whose judgment I agree. I am therefore of opinion that this order must be discharged.

CAVE, J. If this had been res nova, I should have found great difficulty in coming to the conclusion that the words in the 15 & 16 Vict. c. 54, s. 10, "it shall be lawful for the party to the suit or other proceeding, or for an attorney of one of Her Majesty's Superior Courts of Record being *an* attorney acting generally in the action for such party," mean "it shall be lawful for the party to the suit or other proceeding, or for an attorney of one of Her Majesty's Superior Courts of Record being *the* attorney acting generally in the action," and I should have been at loss to suggest any reason why the Court should use this roundabout expression instead of saying simply, "It should be lawful for the party to the suit or other proceeding, or for his attorney being an attorney of one of Her Majesty's Superior Courts of Record." But upon consideration of the language used by the judges in *Ex parte Rogers* (1), and in the face of the opinion of my brother Collins, I feel that it is not open to me to consider that question, and that I must deal with the construction of that section as if the words used had been "an attorney, &c., being *the* attorney acting generally in the action." When I come to interpret *those* words, I respectfully concur in the opinion of Lord Blackburn, that there can only be one attorney for a party at a time, and that the words "the attorney for the party" do not include the managing clerk of the attorney in whose name the proceedings in the action are conducted. If, as under these circumstances I am bound to hold, that that is the true construction of the 15 & 16 Vict. c. 54, s. 10, I do not see how I can put a different construction on what are practically, if not identically, the same words in the statute of 1888. It has

(1) Law Rep. 3 C. P. 490.

been contended, however, that the words of the statute of 1888, "the right of a solicitor to address the Court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor," enable us to decide this case in favour of the appellant. If I could read the words as they stand, "a solicitor being *a* solicitor acting generally in the action or matter for such party," I should think that there was great force in this contention. The words naturally apply to a managing clerk for a solicitor who is himself a solicitor, and who as managing clerk has had the management and control of the action, and I do not understand what the expression "exclusive employment" means, unless it means that he is excluded from carrying on business on his own account. But, as I have said, I think I am precluded from reading the words as they stand. The clause says that "the right of a solicitor to address the Court shall not be excluded by reason only that he is in the permanent and exclusive employment of any other solicitor." But the right of a solicitor who is the managing clerk of the solicitor in the action, and who has had the management and control of the proceedings in the action, is not excluded on the ground specified in the clause, but on the ground that he is not *the* solicitor acting generally in the action. I am therefore compelled to come to the somewhat absurd conclusion that this clause has no meaning at all and does not in any way affect the construction of the Act. It is said that it refers to a managing clerk to a solicitor who is allowed to carry on business in the county court without limit in his own name and for his own benefit. But I confess I do not see how such a man can be said to be in the *exclusive* employment of the solicitor whose managing clerk he is; and I very much doubt whether such arrangements exist to any considerable extent in the profession. I have a strong suspicion that the clause in question was intended to put an end, in favour of managing clerks who are solicitors, to the question, whether they could address the Court in matters in which they had been acting generally for the party; but even if this is so, I am afraid the words used are not sufficient, so long as I am obliged to construe the words "being *a* solicitor acting generally in the

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action" as meaning the same thing as the words "being *the* solicitor acting generally in the action." I agree, therefore, that this rule must be discharged.

Rule discharged.

Solicitor for Mr. Addison: *E. W. Williamson.*

Solicitor for county court judge: *Solicitor to the Treasury.*

J. F. C.

C. A.

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June 25.

[IN THE COURT OF APPEAL.]

HOLLAND AND ANOTHER *v.* LESLIE.

Practice—Amendment—Writ for Service out of Jurisdiction—Statement of Claim indorsed on Writ—Power to amend Statement of Claim—Order XI.; *Order* XXVIII., *rr.* 1, 6.

The provisions of Order XXVIII. as to the amendment of indorsements and pleadings apply to writs issued for service out of the jurisdiction.

Where a writ had been issued for service, and served out of the jurisdiction, and the defendant had appeared thereto:—

Held, affirming the decision of a Divisional Court, that the indorsement of claim on such writ might be amended under Order XXVIII., the amendment sought to be made not introducing a cause of action in respect of which leave for service out of the jurisdiction could not have been given.

APPEAL from the order of a Divisional Court (Cave and Collins, JJ.), affirming the order of Lawrance, J., at chambers, allowing the plaintiffs to amend the statement of claim indorsed upon the writ.

The facts are stated in the report of the case in the Court below. (1)

Watt, for the defendant. [His argument was substantially the same as in the Court below. He cited *The Cassiopeia.* (2)]

R. V. Bankes, for the plaintiffs, was not called upon.

LORD ESHER, M.R. In this case the plaintiffs appear to have had a cause of action against the defendant upon a bill of exchange, which had been accepted by the defendant and had not been paid. In indorsing the statement of that cause of action upon the writ, they made a blunder, and gave a wrong

(1) Ante, p. 346. (2) 4 P. D. 188.

description of the bill. Leave was given for the issue of the writ so indorsed, and service of notice of it out of the jurisdiction; such notice was duly served upon the defendant abroad; and the defendant has in due course appeared in this country. It is argued that, under these circumstances, the writ cannot be amended. Why not? The rules with regard to amendments appear in terms to apply to such a case. It is contended, nevertheless, that there cannot be an amendment, because the writ was for service, and has been served, out of the jurisdiction. But the defendant has now appeared in this country; and I can see no reason why an amendment such as this should not be made, just as in the case of a writ served within the jurisdiction. We were pressed with the possibility that, if such a writ could be amended, it might be amended so as to introduce a cause of action in respect of which leave could not have been originally given for service out of the jurisdiction. That is not the present case. When that case arises, there may be good reason for refusing to allow the amendment.

The case of *The Cassiopeia* (1), which related to the Admiralty practice with regard to the service of writs in actions in rem, has no bearing on the present case. I think that this appeal must be dismissed.

KAY, L.J. I agree. The contention of the defendant must really go the length of saying that there never can be an amendment in the case of a writ served abroad. In this case the writ was properly issued, and notice of it was served out of the jurisdiction. The defendant appeared, and had to give an address for service within the jurisdiction. Then an amendment was sought to be made, altering the description of the bill of exchange sued upon given in the indorsement on the writ. It is admitted that the proposed amendment would be a perfectly proper amendment in the case of a defendant resident within the jurisdiction; and I can see no reason why it should not be made in the case of a defendant resident out of the jurisdiction after he has appeared. The orders do not provide that a writ so amended shall, after the amendment, be served again, but only

(1) 4 P. D. 188.

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that it shall be delivered to the defendant. If the amendment had introduced a cause of action in respect of which a writ could not be served out of the jurisdiction, that would be a ground for setting aside or refusing to allow the amendment; but that is not the case here.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitor for plaintiffs: *W. H. Herbert.*
Solicitors for defendant: *Webster & Webster.*

E. L.

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May 10; *June* 2, 25.

SHENSTONE & CO. *v.* HILTON.

Factor—Dispositions by Sellers and Buyers of Goods—Hiring Agreement—Delivery by Hirer to Auctioneer for Sale—Receipt and Sale in good Faith and without Notice—Validity of Delivery or Transfer—"Delivery under any Agreement for Sale"—"Agreement for Sale, Pledge, or other Disposition"—Factors Act, 1889 (52 & 53 *Vict. c.* 45), *s.* 9.

By the Factors Act, 1889, s. 2, a sale, pledge, or other disposition, by a mercantile agent in the course of business, of goods of which he is in possession with the consent of the owner, is valid, provided the person taking under the disposition acts in good faith and without notice of want of authority.

By s. 9, "Where a person having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods . . . . the delivery or transfer by that person . . . . of the goods, ... under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . . with the consent of the owner."

The plaintiffs let a piano by a hiring agreement, the piano on payment of all the instalments to become the property of the hirer. The hirer delivered the piano to the defendant, an auctioneer, to be sold by auction, some instalments being then unpaid. The defendant received the piano in good faith, without notice of the plaintiffs' rights, sold it, and paid the proceeds to the hirer.

In an action for conversion of the piano:—

Held, that the hirer had agreed to buy, and had obtained, with the consent of the plaintiffs, possession of, the piano, that the delivery by the hirer to the defendant had the same effect as if the hirer were a mercantile agent, that the words "delivery under any agreement for sale" were not confined to delivery to the person receiving the goods pursuant to a sale by the person delivering them, that the words "agreement for sale, pledge, or other disposi-

tion" included a delivery of goods to be sold, by the person receiving, for the benefit of the person delivering, and therefore that the defendant was protected from liability by s. 9.

Taylor v. *Kymer* (3 B. & Ad. 320), and *Hastings* v. *Pearson* ([1893] 1 Q. B. 62), distinguished.

FURTHER CONSIDERATION.

The action was brought to recover damages for the conversion by the defendant of a piano belonging to the plaintiffs. The piano had been let by the plaintiffs to a person named Nye, who was a furniture salesman, by a hiring agreement signed by Nye, which provided that Nye hired the piano from the plaintiffs upon the terms and conditions following:—

To pay to the plaintiffs, without demand, 15*s.* 6*d.* per month for the hire of the piano, such sum to become due and payable in advance, and all expenses of carriage;

To keep the piano at his residence, and not to remove it without the knowledge and consent of the plaintiffs;

To keep the piano in good order (reasonable wear excepted), and to allow the plaintiffs to enter the premises and inspect it;

Not to remove any label, or deface the number on the piano;

That in case of default in the punctual payment of the monthly sum of 15*s.* 6*d.*, or if Nye should assign or underlet, or seek to assign or underlet, the piano, or should be served with any legal process in bankruptcy or otherwise, or should negotiate with his creditors for liquidation of his affairs (of which service or negotiation he was to give the plaintiffs notice), or should do or suffer to be done any other act or thing repugnant to any of the above terms or conditions, the plaintiffs might, without prejudice to their right to recover arrears of hire and damages for breach of the agreement, immediately, and without giving notice, terminate the hiring, and retake possession of the piano;

In case the piano be damaged or destroyed by fire or otherwise, Nye undertook to be responsible for the loss.

"Note" (signed by the plaintiffs).—"If 32 guineas is paid as hire for the pianoforte herein by monthly hire instalments, as per this agreement, the said pianoforte is then to become the property of the hirer."

Nye obtained possession of the piano, and paid some of the

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monthly instalments. Afterwards Nye delivered the piano to the defendant, an auctioneer, to be sold by auction. The defendant accordingly sold the piano, and paid the purchase-money to Nye. The defendant by his defence relied on the Factors Act, 1889. (1)

The trial took place on May 10 before Bruce, J., and a common jury. The jury found that the defendant received the piano in good faith, and without notice of any lien or other right of the plaintiffs in respect of the piano.

The case was reserved for further consideration.

June 2. *McCall, Q.C.*, and *Ritter*, for the plaintiffs. The finding of the jury cannot relieve the defendant from liability, for the protection afforded by s. 9 of the Factors Act, 1889, only applies where the delivery or transfer is made by a mercantile agent, which the hirer of the piano, Nye, was not: *Hastings* v. *Pearson*. (2) There was no delivery by Nye to the defendant

(1) 52 & 53 Vict. c. 45. By s. 1: "For the purposes of this Act—

"(1.) The expression 'mercantile agent' shall mean a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods . . . .

"*Dispositions by Mercantile Agents.*"

Sect. 2: "(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same . . . .

"*Dispositions by Sellers and Buyers of Goods . . . .*"

Sect. 9: "Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

(2) [1893] 1 Q. B. 62.

under any such disposition as is contemplated by s. 9, for "disposition" must mean something in the nature of a sale: *Taylor* v. *Kymer* (1); and there was nothing in the nature of a sale by Nye to the defendant.

W. Willis, Q.C., and *Blackwell*, for the defendant. The defendant is protected by s. 9. The cases relied on for the plaintiffs are distinguishable. *Hastings* v. *Pearson* (2) turned on the construction of s. 2 of the Act, and the Court held that the person who pawned the goods was not a mercantile agent; but s. 9 applies whether the person making the delivery or transfer is a mercantile agent or not. *Taylor* v. *Kymer* (1) turned on the repealed Act (6 Geo. 4, c. 94, s. 2), the words of which were "sale or disposition"; but the words of s. 9 of the Act of 1889 are "sale, pledge, or other disposition," which are much wider, and include the present case. [The following cases were also referred to: *Barker* v. *Furlong* (3); *Consolidated Company* v. *Curtis & Son* (4); *Helby* v. *Matthews*. (5)]

Cur. adv. vult.

June 25. BRUCE, J. This is an action brought by the plaintiffs against the defendant for conversion by the defendant to his own use of a piano of the plaintiffs'. The plaintiffs entered into an agreement with one Nye, by which they agreed that if 32 guineas were paid by Nye as hire for a piano by monthly instalments the piano was to become the property of Nye. Nye obtained the possession of the piano on the terms of this agreement. It is not necessary for me to refer at length to the terms of the agreement. It is enough to say that I cannot distinguish the agreement from the agreement in *Helby* v. *Matthews* (5); and, in accordance with the decision of the Court of Appeal in that case, I consider that I must hold that Nye had agreed to buy, and had obtained, with the consent of the seller, possession of the piano within the meaning of s. 9 of the Factors Act, 1889. Nye paid certain of the instalments pursuant to the agreement, amounting to about 3*l.* 2*s.*, and on April 20, 1893, he

(1) 3 B. & Ad. 320.
(2) [1893] 1 Q. B. 62.
(3) [1891] 2 Ch. 172.
(4) [1892] 1 Q. B. 495.
(5) [1894] 2 Q. B. 262.

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delivered the piano to the defendant, who is an auctioneer, to be sold by auction. The defendant sold the piano by auction for 13*l.* to a person who gave the name of Neaps, and the defendant paid over the purchase-money, less 1*l.* commission, to Nye. Neaps cannot now be found, and the question arises whether the defendant can claim the protection of the 9th section of the Factors Act, 1889. The jury have found that the defendant received the piano in good faith and without notice of any lien or other right of the plaintiffs in the piano. It was contended before me by counsel for the plaintiffs that, notwithstanding the finding of the jury, the 9th section of the Act had no application to the case, and that the protection granted thereby only applied to cases where the delivery or transfer was made by a mercantile agent. I am of opinion that no such limitation can be placed upon the word "person" in the 9th section. I think the meaning of the section is that where any person who has agreed to buy goods, obtains, with the consent of the seller, the possession of the goods, and makes a delivery or transfer of the goods, such as is mentioned in the section, the delivery or transfer so made by him shall be, whether he is a mercantile agent or not, as valid as if he were a mercantile agent. The case of *Hastings* v. *Pearson* (1), which was cited by the plaintiffs' counsel, seems to me to have no application to the present case. The point there raised related solely to the construction to be put upon the 2nd section of the Act. The other point contended for by the plaintiffs' counsel was that the delivery or transfer of the piano by Nye to the defendant was not a delivery or transfer to the defendant under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, within the meaning of the section. If Nye had pledged the piano or sold it to the defendant, the transaction would have been protected; but it was contended that, because Nye merely delivered the piano to the defendant for sale, that did not constitute a delivery under an agreement for sale. It seems to me that it would be to restrict the natural meaning of the words "delivery under any agreement for sale" to hold that they apply only to cases where the goods are delivered to the person who

(1) [1893] 1 Q. B. 62.

receives them, pursuant to a sale of the goods by the person who delivers them to the person who receives them. The case of *Taylor* v. *Kymer* (1) was cited on this point as an authority in favour of the plaintiffs. That case does not seem to me to govern the present. It was a decision upon the words of the 2nd section of the Factors Act (6 Geo. 4, c. 94). (2) The words there are "any contract . . . for the sale or disposition" of goods. The Court held that the word "disposition" in that section must mean "something in the nature of a sale." The phrase "any agreement for sale, pledge, or other disposition" is, I think, wider in its scope than the phrase "any contract for sale or disposition"; but even if I were to adopt the interpretation of the old Act, as applicable to the words of the Act of 1889, I should be prepared to hold that a delivery of goods on the terms that they should be sold by the person to whom they were delivered for the benefit of the person delivering them was a "disposition, something in the nature of a sale." I have come to the conclusion that I should enter judgment for the defendant, with costs.

Judgment for the defendant.

Solicitors for plaintiffs: *H. A. Lovett & Co.*.
Solicitor for defendant: *S. Myers.*

(1) 3 B. & Ad. 320, at p. 337.
(2) Repealed by 52 & 53 Vict. c. 45, s. 14.

P. B. H.

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May 5, 28.

[CROWN CASE RESERVED.]

THE QUEEN *v.* DENNIS.

Metropolis—Public Health—Offences—Unsound Food—Fruit unfit for the Food of Man—Liability to Seizure—"Found in the Possession of any Person"—Purchase for the Food of Man—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 47, *sub-s.* 3.

By the Public Health (London) Act, 1891, s. 47, sub-s. 1, any medical officer of health or sanitary inspector may enter premises and inspect and examine any article intended for the food of man, and sold or exposed for sale, or deposited for sale or preparation for sale; and, if such article appears to be unfit for the food of man, may seize it, and, by sub-s. 2, it may be condemned.

By sub-s. 3, where it is shewn that any article liable to be seized under the section, and found in the possession of any person, was purchased by him for the food of man, and when purchased was in such a condition as to be liable to be seized and condemned under the section, the seller is liable to a penalty unless he proves that, when he sold the article, he did not know, and had no reason to believe, that it was in such condition:—

Held, by the Court (Mathew, J., dissenting), that the vendor can only be convicted under sub-s. 3 where the article is liable to be seized after it has got into the possession of the purchaser.

The defendant, a fruit broker, was charged under sub-s. 3. He had sold walnuts which turned out to be unsound. A printed notice was posted up in his shop, to the effect that the walnuts were sold on the condition that, if any of the contents of the bags should prove unsound, the buyer should sort them and destroy the unsound walnuts.

The jury were directed to find the defendant guilty, if he sold the walnuts when unfit for the food of man, unless he proved that he did not know, and had no reason to believe, that they were so, and were told that the defendant could not contract himself out of liability by agreeing that the buyer should sort out and destroy the bad nuts, and that they must disregard the printed notice.

Held, by Hawkins, Cave, Grantham, Charles, Vaughan Williams, Lawrance, Wright, Collins, Bruce, and Kennedy, JJ. (Mathew, J., dissenting), that the conviction was wrong, and must be quashed.

Held, by Hawkins, Grantham, Charles, Lawrance, Wright, Bruce, and Kennedy, JJ., that the jury ought to have been asked whether the sale was made subject to the terms of the printed notice, and whether the walnuts were purchased for the food of man.

Held, by Mathew and Cave, JJ., that, assuming the notice to be embodied in the contract of sale, the defendant was not thereby relieved of the duty intended to be imposed upon him as seller by sub-s. 3, and that the question, whether the unsound walnuts were purchased for the food of man, ought not to be put to the jury.

Held, by Mathew, J., that, when the defendant sold the walnuts, they were

intended for the food of man, and were sold to be used for food while they were unsound and unwholesome, and, therefore, were "liable to be seized" under sub-s. 3, and that the conviction ought to be affirmed.

CASE stated by the chairman of the County of London Sessions at Newington.

John William Dennis was tried on an indictment charging him with having committed an offence under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47, sub-s. 3. (1)

The indictment (which was annexed to the case) stated that Dennis was charged before a metropolitan police magistrate, and

(1) By 54 & 55 Vict. c. 76, s. 47, sub-s. 1: "Any medical officer of health or sanitary inspector may at all reasonable times enter any premises and inspect and examine (*a*) any animal intended for the food of man which is exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale, and (*b*) any article, whether solid or liquid, intended for the food of man, and sold or exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the person charged; and if any such animal or article appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same, himself or by an assistant, in order to have the same dealt with by a justice."

By sub-s. 2: "If it appears to a justice that any animal or article which has been seized, or is liable to be seized under this section, is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed, or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs, or did belong at the time of sale or exposure for sale, or deposit for the purpose of sale or of preparation for sale, or in whose possession or on whose premises the same was found, shall be liable on summary conviction to a fine not exceeding 50*l.* for every animal, or article, or if the article consists of fruit, vegetables, corn, bread, or flour, for every parcel thereof so condemned, or, at the discretion of the Court, without the infliction of a fine, to imprisonment for a term of not more than six months, with or without hard labour."

By sub-s. 3: "Where it is shewn that any article liable to be seized under this section, and found in the possession of any person, was purchased by him from another person for the food of man, and when so purchased was in such a condition as to be liable to be seized and condemned under this section, the person who so sold the same shall be liable to the fine and imprisonment above mentioned, unless he proves that at the time he sold the said article he did not know, and had no reason to believe, that it was in such condition."

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was informed of his right to be tried before a jury (1), and did claim and require to be so tried.

The indictment further stated that Dennis on October 21, 1893, at 27, James Street, Covent Garden, unlawfully did sell to Charles Lyons certain articles intended for the food of man—to wit, certain walnuts—which were at the time of such sale unwholesome and unfit for the food of man, and the said articles, being then articles liable to be seized under s. 47 of the Public Health (London) Act, 1891, were on October 23, 1893, found in the possession of Lyons, having been purchased by Lyons from Dennis for the food of man, and which articles when so purchased were in such a condition as to be liable to be seized and condemned under the section, against the form of the statute, &c.

The following were the facts stated in the case.

The defendant was an English and foreign fruit and potato broker, and carried on business in Covent Garden.

On or about October 11, 1893, a consignment of eighty-three bags of "Grenoble" walnuts was received at the defendant's warehouse for sale on behalf of the foreign owner. One bag was taken indiscriminately from the bulk as a sample.

On October 21, 1893, ten bags of these walnuts were sold to a customer. This was the first sale made from this consignment. Later in the day, and after the sale to Lyons hereinafter mentioned, eight of those ten bags were returned by the customer as bad, and exchanged for others of a different kind. The remaining two bags were kept by the customer as being good. On October 23, 1893, the defendant was informed for the first time of the bad quality of the nuts, and ordered the bulk to be examined. As the result of that examination the eight returned bags, and about fifteen more, were, by the defendant's orders, destroyed, because there were not in those bags a sufficient number of good nuts to pay the cost of separating the good from the bad. What then remained of the bulk were sold to a person who promised to sort them and destroy the bad ones.

On Saturday, October 21, 1893, Lyons, a wholesale and retail fruiterer, bought twenty bags of the walnuts, after examining

(1) By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17.

the sample bag, but without examining the bulk, although he would have been allowed to do so if he had chosen.

Over the pigeon-hole of the pay desk in the shop where Lyons bought and paid for the walnuts there was exhibited a printed notice (annexed to the case, and marked *B*), which was as follows:—

"Special Notice to Buyers.

"Original packages of either fruit or vegetables, the contents of which may partly prove unsound, either from delay in transit or any other cause, are sold on the express condition that the 'Buyers' sort the said contents, and destroy the unsound portion before being offered to the public.

"W. Dennis & Sons."

The same Saturday evening, after he had taken them away, Lyons, after shooting some of them on his stall in preparation for sale, found the major portion of the bulk of the walnuts were bad, and endeavoured to return them to the defendant, but as it was after business hours the defendant's premises were closed. Lyons then tried to find a sanitary inspector, but failed to do so until the following Monday, October 23, 1893, when he handed the walnuts to the sanitary inspector for the Vestry of Bermondsey.

On October 23, 1893, the sanitary inspector took the whole of the walnuts handed to him by Lyons to the Southwark Metropolitan Police Court, where, after inspection, they were condemned by the magistrate as unfit for the food of man, and destroyed.

No proceedings were taken against Lyons with respect to the walnuts.

Paragraph 9. The defendant (1) and his witnesses proved that it was the practice of the fruit brokers in Covent Garden to sell foreign fruit in the original packages in which it comes from abroad, without any examination of the contents, except by opening one or more samples, according to the size of the

(1) By s. 118 of the Public Health (London) Act, 1891: "Any person charged with an offence under this Act, and the wife or husband of such person, may, if such person thinks fit, be called, sworn, examined, and cross-examined, as an ordinary witness in the case."

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consignment, and by seeing whether the outsides of the packages shewed any signs of damage, and by testing the weight, and by the smell. But the buyers might examine the bulk if they chose. That packages were frequently sold although the brokers knew, or had reason to believe, that some part of the contents was bad and unfit for the food of man, but that, as between the brokers and the buyers, it was the buyer's duty to see that the bad fruit was separated from the good, and destroyed, and that none of it was offered to the public. It was also stated by those witnesses that there was neither time, nor room, nor skilled labour enough obtainable at Covent Garden, to enable the brokers to sort the good fruit from the bad before it was sold by them.

The fruit in the sample bag of walnuts was good, and at the time the consignment was received there was nothing in the external appearance of the packages in the bulk, or in their weight or smell, to indicate that the contents were bad. These were the cheapest quality of walnut the defendant had in stock.

The defendant admitted that he knew most of the bags in this consignment would in all probability contain some walnuts which were bad and unfit for the food of man, and that he sold them with that knowledge. He said he should not have sold them if he had known they were so bad as they turned out to be, but that he would sell walnuts when there was a sufficient quantity of good nuts in the packages to make it profitable to sort the good from the bad. If there was a less quantity of good nuts than that he would have the whole of the packages destroyed. He also admitted that a larger proportion of walnuts had turned out bad than usual that season, and that the class of walnuts in question, having had their husks removed by means of chemicals, were liable to go bad quickly, sometimes in two or three days. At the date of the sale to Lyons these walnuts had been in stock ten days.

On those facts it was contended by counsel for the defendant: (1.) That no offence under s. 47, sub-s. 3, of the Act had been shewn, because that sub-section only applied where the person in whose possession the articles in question were found had himself committed an offence under s. 47, sub-s. 2.

(2.) That if the defendant had contracted with Lyons that Lyons should (in accordance with the printed notice) sort out and destroy the unsound fruit from the walnuts sold to him, the defendant would not be guilty of the offence charged, and that the printed notice was evidence of such a contract.

(3.) That the jury should be asked whether the defendant, when he sold the packages of walnuts knowing there were some bad ones among them, intended the bad or only the good ones for the food of man?

The chairman overruled contentions (1.) and (2.), and declined to leave the question (3.) to the jury.

Paragraph 14. The chairman directed the jury to find the defendant guilty, if they found that he sold the walnuts to Lyons, and that the walnuts were at the time of sale unfit for the food of man, unless the defendant proved that at the time he sold them he did not know, and had no reason to believe, they were unfit for the food of man.

The chairman further told the jury that the defendant could not contract himself out of the liability to a penalty under the Act by agreeing with Lyons to sort out and destroy the bad nuts, and that they must altogether disregard the printed notice.

The jury returned a verdict of "guilty."

The case at first came on for argument before five judges (1); but, as a difference of opinion arose, it was directed that it should be re-argued before the full Court.

May 5. *Sir Henry James, Q.C.* (*Finlay, Q.C.*, and *R. D. Muir*, with him), for the defendant. The conviction was wrong. The defendant could only be convicted, if at all, under sub-s. 3 of s. 47 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76). To justify a conviction under sub-s. 3, the article found in the possession of the defendant must be "liable to be seized under this section," i.e., s. 47, and to render the article liable to be seized it must come within the words of sub-s. 1 (*b*), and must be "intended for the food of man, and sold, or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale." These words cannot be made applicable

(1) Lord Coleridge, C.J., Hawkins, Mathew, Cave, and Grantham, JJ.

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to the bad walnuts in the present case. It is clear that those bad walnuts, when purchased by Lyons from the defendant, were not "intended for the food of man," for the contract of sale was made on the terms contained in the "Special Notice to Buyers," referred to in the case: see *Symonds* v. *Pain* (1); *Sandys* v. *Small* (2); therefore it was an express contract that Lyons should take out and destroy the bad walnuts before offering the good for sale to the public, which amounts to a contract that the bad walnuts should not be sold for the food of man. If there was any doubt as to the terms of the contract of sale, the question should have been left to the jury, and, as it was not left to them, the conviction cannot be supported. The mere act of selling an article which comes within the definition of human food, if the article is sold for some other purpose, and is not intended for human food, cannot amount to an offence under the statute—for instance, the sale of stale fish to be used as manure would not be an offence. The bad walnuts, if they can be said to have been "found in the possession" of Lyons at all, were not, when so found, "liable to be seized," for it is clear that they were not then intended for the food of man: *Vinter* v. *Hind.* (3) On the circumstances stated in the case, Lyons could not possibly have been convicted of any offence, and, that being so, neither could the defendant. If this conviction stands, serious difficulties will arise in conducting the business of the sale of foreign fruit, as, for instance, in the case of the sale of oranges, where each package is almost certain to contain some damaged fruit.

George Elliott, for the prosecution. In *Vinter* v. *Hind* (3), the words, on which the case was decided, in ss. 116 and 117 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), were not so wide as those on which the present case turns, and it seems probable that the section now before the Court was passed with the view of meeting such a point as that which arose in *Vinter* v. *Hind.* (3) The defendant himself admitted that he knew that most of the bags would probably contain walnuts which were bad and unfit for the food of man, and yet, with that knowledge, he sold them to a person whose business it was to sell walnuts for human food.

(1) 6 H. & N. 709; 30 L. J. (Ex.) 256. (2) 3 Q. B. D. 449.
(3) 10 Q. B. D. 63.

The burden of proof is cast on him, for by sub-s. 3 he is liable, "unless he proves that at the time he sold the said article he did not know, and had no reason to believe, that it was in such condition." The right questions were left to the jury. It could not be for them to find what the meaning of the notice was. The walnuts were "liable to be seized" under the Act, if they were liable to seizure at any period of time between their arrival at the defendant's warehouse and their being shot out on to the stall of Lyons, as stated in the case. The Act in question was passed for the protection of the public, and its provisions ought not to receive a limited construction. In order to justify the conviction, it is not necessary to contend that Lyons was guilty of any offence, nor is it necessary to shew any fraudulent intent on the part of the defendant. It was not necessary that there should be any summons or notice to the defendant, before the walnuts were seized and condemned, either in order to justify such seizure and condemnation, or in order to justify the defendant's subsequent conviction: *White* v. *Redfern*. (1) The jury have found enough, on the evidence and on the questions left to them, to justify the conviction. The proper inference is, that the jury meant by their verdict to find that the walnuts were purchased from the defendant for the food of man.

Cur. adv. vult.

May 28. The following judgments were delivered:—

KENNEDY, J. I have come to the conclusion that this conviction cannot be sustained.

In the first place, in order to establish any case against a seller, such as the accused in this case was, under the statute 54 & 55 Vict. c. 76, s. 47, sub-s. 3, it is, in my judgment, clearly necessary from the terms of the sub-section itself, to prove that the article found in the possession of the purchaser was an article "liable to be seized under this section."

Sub-sect. 1 tells us what is meant by the term "liable to be seized." The article is "liable to be seized" only if it is an article, (*a*), intended for the food of man; (*b*), sold or exposed

(1) 5 Q. B. D. 15.

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for sale, or deposited in any place for the purpose of sale or preparation for sale; (c), appearing to the inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man.

The facts of this case shew, in my view, that the second of these essential elements did not exist. It is not the fact that when the walnuts in the possession of Lyons were, at the instance of Lyons himself, taken by the inspector, they were either sold or exposed for sale, or deposited in any place for the purpose of sale or preparation for sale. Therefore they did not constitute an article "liable to be seized" within the meaning of the section.

In the second place, the conviction of a seller under sub-s. 3 cannot be justified, unless the buyer is shewn to have purchased the article "for the food of man." In order to negative this, evidence was adduced by the defendant as to the exhibition of the special printed notice to buyers, and as to the practice of fruit brokers. It was evidence, no doubt, to be considered by the jury only in connection with all the other circumstances of the case. It was for the jury to consider whether the transaction, which appears otherwise to have been a sale by sample of articles commonly used for human food, was really made subject to the terms of the notice, and what weight should be given to the alleged trade practice, and then to use their conclusions on these points—with all other matters found to their satisfaction—in determining whether the walnuts were or were not purchased for the food of man.

Speaking for myself, I should say that, if the evidence in question was believed, a jury might not improperly find that Lyons bought, and the accused sold, the sound walnuts, and the sound walnuts only, for the food of man, and the unsound for destruction—subject, of course, to Lyons's right to reject the whole lot, if upon inspection he found the bulk inferior to sample, or to prefer a claim for damages for breach of warranty. But, be this as it may, it could not, in my judgment, be right to direct the jury, as, from paragraph 14 of the case, the learned chairman appears to me, in effect—by limiting their consideration to questions as to the fact of the sale by the defendant, the condition of the walnuts when sold, and the defendant's

knowledge and belief as to their condition—to have directed the jury, that they need not trouble themselves to find whether or not the walnuts were purchased from the accused for the food of man; and further to direct the jury, as he did, that they must disregard the evidence of the terms, as to sorting out and destroying the bad walnuts, upon which the transaction between the defendant and Lyons was, according to the defendant's contention, effected.

It seems to me, looking at paragraph 14 of the case, impossible to infer, as the learned counsel, who appeared before us to support the conviction, asked us to infer, that the jury meant by their verdict to find that the walnuts were purchased from the accused for the food of man.

The verdict of "guilty" in this case was, in my view, a verdict which, in consequence of the chairman's direction, was arrived at without a finding by the jury of that which was essential to the proof of the offence charged, and therefore the conviction on this second ground also ought, in my judgment, to be quashed.

GRANTHAM, J. Were it not for the strong opinions expressed in favour of this conviction by my brothers Cave and Mathew on the first argument of the case, I should have thought that the case for a conviction was unarguable, and that the conviction must be quashed. The rehearing of the case to-day (1) has not in any way affected my judgment.

What is the true way of testing such a case as this? Not to first argue what crimes or wrongs it is supposed were intended to be reached by the statute, and then to endeavour to make the facts of the case fit the supposed intention of the statute, but first to understand exactly what the facts are, and then see if the statute as drawn was intended to apply, and does in fact apply to those facts. Applying that principle, let us see what the facts are.

A fruit broker receives an intimation from a foreign consignor, probably through his shipping agent, or it may be only from the

(1) This judgment, though not delivered until May 28, was written on May 5, the day on which the second argument (before eleven judges) had taken place.

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carman delivering the goods, that a consignment consisting of a number of packages or bags containing walnuts has been forwarded from Grenoble to him, as a fruit broker, for sale. The walnuts, when despatched from Grenoble, were, no doubt, intended for human food, and were fit for human food, but the broker (the defendant) knows from his experience that, by the time any such consignment has reached England, some of the contents of some of the packages will in all probability be bad, or, as we will call it, unfit for human food, and that, in the interval between his selling them and his purchaser retailing them out, a still larger proportion will have become bad, either from the character of the fruit, the season of the year, or sudden changes of temperature. What, under these circumstances, does he do? It must not be forgotten that it is never intended that the broker is to be the retailer. He has only to find some one who will take these packages as they are, get the contents ready for market, and then retail them. The quantity is not, or may not be, sufficient to have an auction, with catalogue and conditions of sale attached, or it may be that there is not time, so he sells them as soon as he can, under a notice to every one who buys that all articles sold in original packages (i.e., that these walnuts) are sold on the express condition that the person taking these packages, or buying these packages, is not to sell for human food any of the walnuts that are bad; those he must undertake to destroy. (He might have said, "or use for some other purpose.") In other words, practically he says, "as we both know that probably some of the walnuts will be bad, and some good, you must separate the good from the bad, and destroy the bad, and, as you buy the packages of me with that liability attached, I expect you to give me only such a price for the good walnuts as will enable you to afford the expense of this sorting and destruction." The buyer therefore fixes the price he will give accordingly, and the price he gives, plus the cost he is put to in sorting, represents the value of, and the cost to him of, the good walnuts.

As it is admitted that the broker in this case can only be convicted under sub-s. 3 of this section, because the walnuts had passed into the hands of his purchaser, it is necessary to see

what his purchaser does. After having bought the walnuts he turns several of the bags out, and finding many more bad than he expected, he never attempts to sort or sell even the good, much less the bad, but bags them up again, and finding the broker's place of business closed, avails himself of the provisions of sub-s. 8 to get the local authority to destroy them, and they are destroyed. Now remembering that no article is liable to be seized that has not been exposed for sale for human food, how is it possible to say that either the broker or his purchaser exposed these walnuts for sale for human food? for the broker distinctly contracted with his purchaser that the bad walnuts should be destroyed, and the purchaser did accordingly carry out his contract and had them destroyed. Let us see now what the language of the 3rd sub-section is, and we shall then find that under no portion of that sub-section can the defendant be convicted. Sect. 47, sub-s. 3: "Where it is shewn that any article *liable to be seized* under this section *and found in the possession* of any person, was *purchased by him* from another person *for the food of man*," &c., &c. There are four distinct propositions therein referred to, to complete the crime: first, the liability to seizure; second, the finding in the possession; third, the purchase; fourth, the purchase for the food of man. First, these walnuts were never "liable to be seized," for, as we have seen, Mr. Lyons had never intended these bad ones for sale for human food, but even if he had so intended —secondly, they were never "*found in the possession*" of Mr. Lyons, because he had given them up to be destroyed; thirdly, they were never purchased by him from the defendant: as I have shewn, it was only the good ones that were purchased; fourthly, if purchased, they were never purchased "for the food of man," for no one had determined, at the time of giving them up for destruction, how many, if any, might be fit for food. The contract between broker and purchaser was a contract to destroy the bad ones, and the purchaser, as I have before shewn, in my judgment did carry out his contract. If he did not, how can the broker be convicted of a crime because his purchaser broke a civil contract?

Many instances were referred to during the course of the argument, and many more might have been given, to shew how

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impossible it is for foreign fruit brokers to sell fruit in original packages in any other way than is adopted as mentioned in this case. The instance I mentioned of the orange broker seemed to me the most familiar and most conclusive. Hardly a case is sold that has not some bad ones in it. For how many bad ones is a broker to be convicted or sent to prison? It has been said that he would not be for five or six bad oranges, but, if not for five or six, would he be for ten, or twenty, or fifty, or how many? I do not say under no circumstances could a broker be convicted, but he could only be convicted if he had an intention to commit the offence, viz., selling articles of food, *unfit for*, and *sold for*, human food, and, as that is a question of fact, that question must be left to the jury. Besides all this, how can it be said that a broker cannot contract himself out of a liability by arranging with his purchaser to destroy the bad walnuts, as the learned chairman stated? His liability is determined by his conduct, and his conduct is determined by his contract of sale. If the purchaser therefore faithfully carries out his contract to destroy, how can any liability attach, and even if he commits a breach of his admitted contract to destroy, how can the broker be convicted? As the learned magistrate refused in this case to put the question of intent to the jury, the indictment must be quashed on that ground alone, even if not on all or any of the grounds I have mentioned. It has been argued that the object of the Act was to prevent the costermonger from being led into temptation to do wrong. You might as well say that anyone carrying a watch in his pocket attached to a gold chain should be convicted of stealing a watch because of the temptation it offers to a pickpocket to steal the watch. No person acting honestly and bonâ fide can by our law be criminally punished because some one else acts dishonestly; but in this case no one acted dishonestly, if the facts as stated were true, and their truth does not seem to have been disputed.

For these reasons, in my judgment, this conviction must be quashed.

CAVE, J. This is a case stated by the chairman of the London County Sessions upon the trial of one John William Dennis,

who was tried and convicted upon an indictment charging him with having committed an offence under the Public Health (London) Act, 1891, s. 47, sub-s. 3.

[The learned judge here read the first three sub-sections of s. 47, which are set out in note (1) on page 459, and continued as follows :—]

The defendant, a foreign fruit and potato broker in Covent Garden, on Saturday, October 21, 1893, sold to Charles Lyons, a wholesale and retail fruiterer, twenty bags of Grenoble walnuts. Lyons bought after examining a sample bag taken indiscriminately from the original bulk of eighty-three bags.

The same Saturday evening, after he had taken them away, Lyons found the major portion of the bulk of the nuts was bad, and endeavoured to return them to the defendant; but, as it was after business hours, the defendant's premises were closed. Lyons then tried to find a sanitary inspector, but failed to do so until Monday the 23rd, when he handed them over to the sanitary inspector for the Vestry of Bermondsey. The walnuts were then taken before a magistrate, condemned as unfit for the food of man, and destroyed.

The first contention on behalf of the defendant was founded on the facts above stated, and was that sub-s. 3 only applied when the person in whose possession the articles in question were found had himself committed an offence under sub-s. 2.

The objection is not very artistically stated; but I think it amounts to this, that the article must be liable to seizure in the possession of the person with whom it is found; and that it is not sufficient that the walnuts were found in the possession of Lyons, unless they were then liable to be seized.

Now, to make the walnuts liable to seizure in the possession of Lyons two conditions must have concurred. The walnuts must have been intended for the food of man, and sold, or exposed for sale, or deposited in some place for the purpose of sale or of preparation for sale.

It is true that the proof that these two conditions did not concur is thrown on the party charged. But the evidence given at the trial did, I think, establish that these two circumstances did not concur while the walnuts were in the possession of

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Lyons, and did not exist when the walnuts were found in his possession.

As soon as he discovered the quality of the walnuts he was minded to reject them as not equal to sample; and it is clear that, when he handed them over to the sanitary inspector on the Monday, if they can be said to have been then found in his possession, they certainly were not then intended for the food of man.

It was, however, contended on behalf of the prosecution that it is sufficient if the liability to seizure existed before the walnuts came into the possession of Lyons; and, as the learned chairman has not stated the grounds on which he overruled the objection of the defendant, this contention is clearly open to the prosecution.

By sub-s. 3 it must be shewn that an article liable to be seized under that section, and found in the possession of any person, was purchased by him of another person for the food of man. Proof, however, that the article was unfit for the food of man will be sufficient primâ facie proof of its liability to seizure, the proof that it was not exposed for sale, or deposited for the purpose of sale or of preparation for sale, or was not intended for the food of man, resting with the person charged. But under sub-s. 3 the prosecution must go on to shew that, when the article was so purchased, it was in such a condition as to be liable to be seized and condemned under that section; and the proof of this rests on the prosecution, which seems to me to shew that the liability to seizure referred to in the first line of sub-s. 3 is not the same as the liability to seizure and condemnation referred to in the fourth line.

It is said, however, that the word "sold" in clause (*b*) of sub-s. 1 imports that the article may be liable to seizure in the hands of an innocent retail purchaser. Sub-s. 3 appears to have been inserted to meet the case of *Vinter* v. *Hind* (1); and the word "sold" was probably inserted for the same purpose. But in *Vinter* v. *Hind* (1) the purchaser apparently intended to use the meat for the food of man at the time when it was seized; while the question here is whether the seller can be convicted

(1) 10 Q. B. D. 63.

where the purchaser did not intend to use the article sold for the food of man at the time when it was found in his possession.

Upon the best consideration I can give to this somewhat obscurely worded section, I think that the contention for the defendant ought to prevail, and that the walnuts in this case were not liable to seizure, which by sub-s. 3 is made a condition precedent to the liability of the vendor to conviction under that section.

These considerations dispose of the case, and I could have wished not to express any opinion on the other points; but as my brethren, or some of them, have thought it necessary to take those points into consideration, I feel bound to give my opinion on the matter. I do not understand the majority of the Court to say that there was not evidence on which the defendant might properly have been convicted, but merely to think that the summing-up of the chairman, as given by him, was not sufficient. I think, however, that we are limited to the objections taken by the defendant's counsel, and that the summing-up is only stated in the case so far as was material for the consideration of those objections, and, for the reasons given by my brother Mathew as to this part of the case, I think that these objections are groundless, and, had the case rested there, I should have been of opinion that the conviction was good. I hold, however, that the first objection is fatal, and that, for the reasons I have given on that part of the case, the conviction must be quashed.

One lesson at least may be learned from this case, and that is that those who state cases for the consideration of this Court should limit themselves to stating the objections taken by the counsel for the defendant, and then ruling upon them, and should not attempt to give a summary of their direction to the jury, which it will in general be easy to shew was inexact or insufficient in some particular or other, owing to its being only a summary made with reference to the objections taken, and not a full statement.

MATHEW, J. In this case proceedings were taken against the defendant under s. 47 of the Public Health (London) Act, 1891, on the ground that he had sold to a dealer named Lyons articles,

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which, within the meaning of that section, were liable to be seized and condemned as unfit for human food.

From the statements in the case it would seem to be clear that the articles in question, viz., walnuts, at the time when they were sold by the defendant, were intended to be used for food. The walnuts were sold by sample, and it was not suggested at the trial that the sample was one of unsound walnuts. It was not, and could not be, denied that the walnuts, when sold, were unfit for food. They were seized by a sanitary inspector, and condemned, and no attempt was made to shew that the magistrate who made the order for their condemnation had either been misled or mistaken as to their condition. The sub-s. 3 of s. 47 is in the following terms:—

[The learned judge here read 54 & 55 Vict. c. 76, s. 47, sub-s. 3, which is set out in note (1) on page 459, and continued as follows:—]

It was argued for the defendant that the walnuts were not "liable to be seized" under the section, because when they were condemned the buyer had no intention to expose them for sale. But I see no reason to doubt that, at the time when the defendant sold to Lyons, the walnuts were liable to be seized under the section, on the ground that they were then intended for the food of man, and were sold to be used for food while they were unsound and unwholesome.

The sub-section appears to me to have been framed to meet the objection raised in *Vinter* v. *Hind.* (1) In that case a butcher who sold unsound meat to a customer was held not to be liable to a penalty under the Public Health Act, 1875, on the ground that when the meat was condemned it did not belong to the butcher, and therefore, that no penalty had been incurred, because of the terms of s. 117 of the statute. Field, J., in his judgment, expressed a clear opinion, that if the inspector had seized the meat while in the possession of the respondent for the purpose of sale, the subsequent proceedings would have been in accordance with the provisions of a similar section in the Act of 1875. The defence on which the defendant mainly relied was this—that the unsound walnuts were not, when they were sold, intended for

(1) 10 Q. B. D. 63.

human food. In support of this contention reliance was placed upon the terms of the notice, under which it was properly admitted that the walnuts were sold. Assuming a contract between the defendant and the dealer to have been made in the words of the notice, the question for our determination would seem to be whether the defendant was thereby relieved of the obligation not to sell articles liable to be seized under s. 47. We are asked to answer that question in the affirmative, and for that purpose in effect to add a proviso to the section, that a sale of what was unfit for food should be lawful, if the seller stipulated that the buyer should, before a re-sale, separate what was sound from what was unsound. This would be to add to the statute what I have no reason to suppose the legislature meant to enact, and what would obviously go far to take away the protection to the public which this statute, and the Public Health Act, 1875, were intended to afford.

It was strenuously contended that the question, whether the defendant had sold the unsound walnuts for the food of man, should be put to the jury. But this was no more than an adroit suggestion that the question of the meaning of the notice should be left to the jury. The terms of the notice are clear. It is not for the jury to say whether any other than their plain and obvious meaning should be attributed to them. And, assuming the notice to be embodied in the contract of sale, I am of opinion that the defendant was not relieved of the duty intended to be imposed upon him as seller by sub-s. 3 of s. 47. The enactment does not permit the seller to shift his responsibility to the buyer. I do not see why, if the notice in question should be held to exonerate the seller, a notice to the same effect, set up in the shop or on the barrow of the buyer, should not be equally available to him, as an answer to proceedings for seizure, condemnation, or punishment, under the statute.

I am of opinion that the conviction was right, and ought to be affirmed.

HAWKINS, J. The defendant was charged before a police magistrate, at the Southwark Police Court, with an offence under sub-s. 3 of s. 47 of the Public Health (London) Act, 1891

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(54 & 55 Vict. c. 76). Under the 17th section of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), he elected to be tried by a jury; and accordingly an indictment was preferred against him at the county of London Quarter Sessions. That indictment was tried before Mr. Warry, the chairman of the sessions, in April, 1894, when, under his direction, the defendant was found guilty, subject to a case, which was argued before a Court consisting of eleven judges.

We have now to pronounce our judgment.

I entertain grave doubt whether the indictment is good; but it is not necessary now to discuss it, because I am of opinion that the conviction ought to be quashed upon other, even more substantial, grounds hereinafter stated.

Before discussing the questions of law raised on behalf of the defendant, it will be convenient to state shortly the facts as set forth in the case.

[The learned judge here stated the facts, the terms of the printed notice, the contentions for the defendant at the trial, and the direction of the chairman to the jury, as set forth in the case, and continued as follows:—]

The offence imputed to the defendant being purely the creation of the 47th section of the statute, it is necessary, in the discussion of this case, constantly to bear in mind the (at the first blush not very clear) language of the three first sub-sections of it; the first sub-section pointing out the circumstances justifying the seizure of articles intended for the food of man, but unfit for that purpose; the second pointing out how the said articles are to be dealt with, and imposing penalties on those found in possession of them; the third subjecting to penalties the vendor, of the unwholesome articles so seized, to the person in whose possession they are so found.

[The learned judge here read 54 & 55 Vict. c. 76, s. 47, sub-s. 1 (omitting clause (*a.*)) and sub-ss. 2 and 3, which clauses are set out in note (1) on page 459, and continued as follows:—]

It may be conceded that walnuts are articles of food liable to seizure by a sanitary inspector under such circumstances, *but under such circumstances only*, as are specified in sub-s. 1. That is to say, if, being *intended for the food of man*, they are found by

such inspector on any premises, sold, or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, *and* if on inspection and examination they appear to such inspector to be unfit for the food of man. The *mere* possession of an article of food, ordinarily used as human food, which is in an unwholesome condition, is not unlawful; nor is the sale of it for any other purpose than for human food. It may be lawfully dealt with and sold for manure, or for a variety of other purposes not necessary to enumerate. It is the sale or exposure of it with the intention that it shall be used for *human* food which is an essential element to the rendering the possession of it illegal; and it is immaterial whether the sale be with the intention that the purchaser is himself to be the consumer, or whether it is sold with a view to its resale for human food by the purchaser. The burden of proof that such intention did not exist is, by s. 47, cast upon the person charged with an offence, and in the absence of such proof the intention to sell for the food of man will be assumed if an article ordinarily so used be found exposed for sale or sold, &c. The non-existence of such a criminal intention is a fact to be established by evidence, and may be proved in a variety of ways: among others, for instance, a bonâ fide contract with the purchaser subject to a condition that an article unfit for human food should not be so used, or disposed of to be so used by others, would be evidence to negative such intention. I say a bonâ fide contract, because a mere illusory formal contract to that effect, coupled with an underlying intention that the restrictive stipulation need not be observed, would be worthless as a protection to the accused; but the evidence of the contract, together with the question of bona fides, ought to be considered by the justices if they have to determine the case, or submitted to the jury, if the defendant elects to be tried by jury, for their consideration; and such jury ought to be asked whether they find the criminal intent negatived by the evidence. In this case, I think, having regard to the practice of the trade, as mentioned in paragraph 9 of the case, and the notice *B.*, there was evidence for the jury to consider (see *Symonds* v. *Pain* (1); *Sandys* v. *Small* (2)); and

(1) 6 H. & N. 709; 30 L. J. (Ex.) 256. (2) 3 Q. B. D. 449.

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if they upon such evidence had come to the conclusion that the defendant bonâ fide did not intend the articles to be, and that he sold upon an express condition that they should not be, used for the food of man until the bad walnuts had been separated from the good ones *and destroyed*, the defendant would have been entitled to an acquittal. Of course, I do not mean to say that the mere fact that the contract of sale was in accordance with notice *B.* would of itself be conclusive as a defence; for the issue before the jury upon the point now under discussion would be, not whether such a contract was in fact made, but whether the alleged criminal intent had been disproved by it with the other evidence, if any. I only say that the contract was evidence material to the issue, and, in my opinion, the chairman was wrong in refusing to leave the question I have suggested, and which was in substance that which the learned counsel desired should be left, to the jury. I have personally entertained a doubt during the consideration of this case, where articles of food of the same character—e.g., oranges—some portions of which are good and some bad are mixed together, but the bad are severable from the good, and are not in such proportion to the good as to make the whole unfit for human food, how the sanitary inspector and the justices ought to deal with them. It is not necessary, however, to settle that point to-day.

I turn my attention now to the offence created by sub-s. 3. To constitute such an offence it must be shewn—first, that articles liable to seizure were found in the possession of a person who has *purchased* of the person accused, *for the food of man*; secondly, that when so purchased the articles were in such a condition as to be liable to be seized and condemned. Put shortly and in order of time, it amounts to this—that the articles must have been liable to seizure when sold by the accused to his purchaser; that they were bought by such purchaser for the food of man; that they were found in such purchaser's possession; and, when so found, were liable to seizure. Upon the facts stated in the case I fail to see any evidence of these requirements to justify the conviction.

First, I think it cannot be truly said that the walnuts were ever, according to the ordinary meaning of the term, "found"

in the possession of Lyons at all. Secondly, they were voluntarily taken by Lyons to the sanitary inspector at the vestry hall; the inspector simply took them into his possession at Lyons's request. They were not, therefore, in any sense of that word, "seized" by the inspector. Thirdly, they were not when handed by Lyons to the inspector (even if that could be called a *finding* and *seizure*) *liable to be seized* under sub-s. 1. They were certainly not then *intended* for the food of man, for they were handed to the inspector *with a view simply to their destruction as unfit for food.* They were never whilst in Lyons's possession either sold or exposed for sale, nor deposited in any place for the purpose of sale, or of preparation for sale; and if upon the facts disclosed in the case Lyons had been charged before the magistrate, he could not have been lawfully convicted under sub-s. 2. That the walnuts were purchased by Lyons with a view to the ultimate sale of such as were good could not be denied, but his intention to sell for human food the bad with the good is inconsistent with his conduct in not offering *any* for sale, but voluntarily handing them all over for destruction, as though they were trade refuse (see sub-s. 8 of s. 47, and s. 33 of the same Act). The absence of all proof that the walnuts were found or were liable to seizure whilst *in Lyons's* possession would alone be fatal to the conviction; but even in the defendant's possession, bad as they for the most part were, they were not seizable for condemnation, even in his warehouse or in his shop, nor could he have been convicted, if he could prove that the nuts in their unwholesome condition were not sold or offered for sale, nor *intended* for the food of man. Proof of the absence of such intention the defendant undoubtedly was entitled to offer to the jury. His counsel endeavoured to do so. The evidence so offered was, in my opinion, very material to that issue, and I think the chairman wrongly rejected it.

I am also of opinion that the direction of the chairman to the jury was erroneous. He seems to have forgotten that, to satisfy the requirements of the third sub-section, essential to a conviction, the jury ought to have been asked to find upon the facts enough to establish, not merely the sale by the defendant to Lyons, and that the nuts were then unfit for human food; but

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that they were liable to seizure under sub-s. 1, both in the hands of the defendant *and* of Lyons—that liability involving those most important questions of the intention of the defendant and the object or purpose for which the nuts were sold by the defendant to and purchased by Lyons. I do not agree altogether in the first contention of the defendant's counsel—viz., that the defendant could not be convicted under sub-s. 3, unless Lyons could be convicted of an offence under sub-s. 2; but I do agree that Lyons must have been placed in circumstances which would render him liable to a conviction, unless he could establish that the walnuts, had they been seizable when in his possession, were not purchased or intended by him for the food of man. The circumstances as against each must be such as to constitute a primâ facie case against each, but the guilt of each must depend upon whether the criminal intention existed—i.e., to sell for human food. One might be able to disprove the existence of such intention, the other might not. In such an event one would be guilty, the other would not. So that the innocence of the purchaser, because he disproved by evidence the criminal intention, would not protect the vendor, who might not be able to offer such evidence. It is not, however, worth while further to notice the point raised, because no primâ facie evidence of any offence by Lyons was offered; and the defendant is entitled to an acquittal on other grounds.

I should not have felt it necessary to discuss this matter at so much length, and with so much detail, had I not felt its great and grave importance, not only to the defendant, whose reputation as a respectable fruit broker I see no reason to question, but to the whole body of fruit brokers, who would find it difficult to pursue their calling if, having done all in their power to prevent unwholesome fruit being offered for sale for human food, they were in peril of criminal prosecution, involving serious fine or imprisonment, under such circumstances as those before us. I recognise to the fullest extent the policy and propriety of severely dealing with those who wilfully or recklessly expose for sale for human food articles they know to be in an unfit condition for consumption; but every man ought to have the fullest opportunity of establishing his innocence if he can.

From a grave oversight on the part of the learned chairman, I think the defendant has been deprived of that opportunity. I think the conviction ought to be quashed, because, on the admitted facts, no offence under sub-s. 3 could be established, and because, even assuming a primâ facie case, the chairman refused to put before the jury evidence tendered material for the defence, and misdirected the jury in telling them what would constitute guilt. The conviction must be quashed.

CHARLES, LAWRANCE, and WRIGHT, JJ., concurred with the judgment of Hawkins, J.

VAUGHAN WILLIAMS, and COLLINS, JJ., agreed with the decision of the majority of the Court that the conviction ought to be quashed.

BRUCE, J., concurred with the judgment of Kennedy, J., and with the reasons given in that judgment.

Conviction quashed.

Solicitor for prosecution: *J. Harrison, Clerk to the Bermondsey Vestry.*

Solicitors for defendant: *Wilson & Wallis.*

P. B. H.

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[IN THE COURT OF APPEAL.]

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Infant—Contract of Service—Contract for Benefit of Infant—Insurance against Accident—Exoneration of Employer from Liability—Practice—Appeal in formâ pauperis—Proceedings on Crown Side of Queen's Bench Division—Appeal from County Court—Rules of Supreme Court, 1883, *Order* XVI., *r.* 22; *Order* LXVIII., *rr.* 1, 2.

The plaintiff entered the service of the defendants, a railway company, as a porter, when under age, and agreed to become a member, and to be bound by the rules, of an insurance society, formed among the employés of the defendants, towards the funds of which the defendants contributed. He at the same time signed an agreement by which he accepted the contribution and the advantages to which he might be entitled under the rules of the society, in lieu of any claims against the defendants under the Employers' Liability Act. The rules of the society covered all accidents, except such as arose wilfully or by gross negligence on the part of the member, and were not restricted to accidents for which the employers would be liable. The rules contained provisions for the limitation of the amount of temporary or permanent relief, these being less than the limit that can be recovered under the Employers' Liability Act; forfeiture of benefits in default of notice of an accident; forfeiture of claims for various breaches of the regulations, or in case of criminal misconduct; and reference of disputes to arbitration. The plaintiff sustained an injury by reason of an accident, and sued the railway company. At the time of the accident and of action brought the plaintiff was still an infant:—

Held, affirming the judgment of the Queen's Bench Division, that the agreement to become a member of the insurance society, and to be bound by its rules, was a part of a contract of service which it was competent for an infant to enter into:

Held, also, that the contract was an answer to the action, for the restrictive rules were such as an insurance society might reasonably make for the protection of their funds, and the contract taken as a whole was for the benefit of the plaintiff and binding on him.

The rule of practice that a party to proceedings on the Crown side of the Queen's Bench Division cannot be admitted to proceed as a pauper is only applicable to cases between the Crown and a subject, and therefore does not apply to appeals from a county court, although they are entered in the Crown paper for hearing.

APPEAL from the judgment of a Divisional Court dismissing an appeal from a county court.

The action was brought to recover damages for injuries which happened to the plaintiff while in the employment of the

defendants. The plaintiff entered the service of the company as porter while under age, and at the time of the happening of the accident, and at the time of the action, which was brought by his next friend, he was still under age. The defence to the action was that the plaintiff had entered into a contract, which was binding on him, not to sue the company in case of any accident happening to him, and the question was whether he was bound by that contract.

It appeared that an insurance society existed among the employés of the railway company to provide, as stated in rule 3 of the rules of the society, pecuniary relief in cases of temporary or permanent disablement, arising from accident occurring while in the discharge of duty, and also in all cases of death.

By the rules every person before becoming a member of the society had to sign a proposal in the following form: "I request to be admitted a member of the London and North Western Railway Insurance Society under scale—and agree to be bound by the rules thereof, a copy of which I have received. I authorize a deduction from my wages of the sum specified in the rules, according to my position in the company's service, for securing to myself, or to my representatives in case of my death, the benefits of the society." The plaintiff signed such a proposal, the scale applicable to his case being fixed by the rules as follows: Weekly payments, 2*d.*; sum insured in case of death arising from accident whilst in the discharge of duty, and in the company's service, and to be granted subject to the provisions of rules Nos. 27 and 28, 80*l.*; the like sum in case of permanent disability and incapacity to resume employment, arising from accident whilst in the discharge of duty, and in the company's service, the same being professionally certified in such manner as may be required by the committee, subject to the provisions of rules Nos. 29 and 33; weekly allowance in case of temporary disablement by accident whilst in the discharge of duty, and in the company's service, certified as in the last case, and subject to the provisions of rules 31, 32 and 38, during continuance of disablement not exceeding fifty-two weeks, 14*s.* These allowances were according to the scale fixed by rule 23, for "members who before sustaining the personal injury in question agree to

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accept the contribution to the funds of the society by the London and North Western Railway Company, or other company or companies employing them (certain other companies previously mentioned worked by the defendant company), and the benefits to which they may become entitled under the rules of the society, in satisfaction and in lieu of any claims they or their personal representatives, or persons entitled in case of their death, may or would otherwise have against the company or companies under, or by virtue of, the provisions of the Employers' Liability Act, 1880, or any Act or Acts amending the same, and enter into an agreement with the company or companies employing them, according to the form in the Appendix No. 2, or to the like effect." This form was as follows:—

"Memorandum of agreement. It is hereby mutually agreed between the —— company (hereinafter referred to as the employers), and —— (hereinafter referred to as the employé), who has requested to be admitted a member of the London and North Western Railway Insurance Society, under Scale A, as follows: The employers agree to contribute to the funds of the said society a sum equivalent to five-sixths of the premiums from time to time payable by the said employé under the rules of the said society.... In consideration thereof the said employé agrees to accept such contribution and any advantages to which he may be entitled under the rules of the said society in satisfaction and in lieu of any claims which he or his personal representatives, or other person or persons entitled in case of his death, might or would otherwise have had under or by reason of the provisions of the Employers' Liability Act, 1880, or any Act or Acts amending the same."

The plaintiff signed such an agreement at the same time that he signed the proposal to become a member of the society.

The rules provided for the appointment of a committee and officers of the society, and generally for the management of its affairs. Rule 27, referred to in the scale of allowances, related to the payment of death allowances, and the particulars necessary to establish the validity of a claim. Rule 28 was as follows: "In the event of a member, who has been injured while on duty and in the company's service, resuming work and afterwards

dying from the effects of such injury, the society shall be liable for the payment of the accidental death allowance, according to scale, should the death occur within a period of six months from the date of his returning to duty; but, subject to the discretion of the committee, no further liability shall after that interval attach to the society, with regard to the payment of the accidental death allowance." Rule 31 provided, "If three days are allowed to elapse before a claim is made by or on behalf of an injured person, he shall be liable to forfeit all benefit up to the date upon which the claim is made, and no claim shall be recognised in any way by the committee in respect of any accident which, through negligence, was not reported to the secretary, within one calendar month from the date of the occurrence of such accident"; and by rule 32, subject to the committee's decision, no claim was to be allowed if the member had recovered or resumed work before application. By rule 33, subject to the discretion of the committee, no member was to be entitled to any payment with respect to a previous accident after he had resumed work for a period of six months. By rule 34: "If in the opinion of the committee the accident is caused wilfully, or by gross negligence on the part of the insured, the insurance hereby affected may, as respects any claim arising out of that accident, be disallowed." By rule 36: "In every case of a person upon the accident register being known to have been out of his house or lodgings after 9 o'clock P.M., between April 1 and September 30, and after 7 o'clock P.M., between October 1 and March 31, the case will be discussed by the committee, and, unless a satisfactory explanation can be given, a fine not exceeding one week's allowance may be inflicted; also, in the case of any such person being intoxicated, the allowance will be liable to forfeiture, at the discretion of the committee." By rule 37: "Any member who is guilty of criminal misconduct shall forfeit all claim to the benefits of the society, either in the shape of allowances or return of half-premiums." Rule 38 related to persons employed more than once temporarily by the company. By rule 40 membership was to cease on the member leaving the company's service. By rule 44: "In case the funds of the society shall be deemed by the committee at any time to be

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insufficient to provide for the liabilities of the society, it shall be competent to the committee to levy not exceeding two additional weekly contributions or subscriptions, according to the scale, during a period of three months." By rule 46 disputes were to be settled by arbitration.

In the county court the damages were agreed at the sum of 35*l.*, if the plaintiff was entitled to recover. The county court judge held that the plaintiff's agreement not to sue the company was binding on him, and entered a nonsuit. On appeal to a Divisional Court the judgment of the county court was affirmed.

Feb. 28. The next friend of the plaintiff applied ex parte and in person on behalf of the plaintiff for leave to appeal in formâ pauperis. The case of *Mulleneisen* v. *Coulson* (1) having been brought to the attention of the Court, the judgment of the Court (Lord Esher, M.R., Lopes and Davey, L.JJ.) was subsequently delivered by

LORD ESHER, M.R. We have considered this matter with the other members of the Court of Appeal, and we are unanimously of opinion that the rule as to no appeal in formâ pauperis being allowed in matters on the Crown side of the Queen's Bench Division is applicable to Crown cases pure and simple between the Crown and a subject. Appeals from a county court are not such cases, that is, they are not cases between the Crown and a subject, and though they have gone into the Crown Paper to be dealt with the rule does not apply to them.

This application will, therefore, be allowed.

June 14. *Minton Senhouse*, for the plaintiff. This is a contract of insurance, and an infant cannot bind himself by such a contract. Primâ facie, an infant cannot bind himself by contract; but to this general rule there are exceptions in the cases of contracts for necessaries, apprenticeship, or service. Bacon's Abridgment, Infancy and Age; Comyn's Digest, "Enfant," C. 2; *De Francesco* v. *Barnum*. (2) These exceptions have been grafted on the common law, and other attempts such as this to enter into contracts are void.

(1) 21 Q. B. D. 3. (2) 45 Ch. D. 430.

In considering whether this contract is one that the infant can make, the question whether it is for his advantage does not arise. Were it otherwise, the effect would be that an infant would have authority to make any contract which the Court thought was for his benefit—a length to which the decisions have never gone.

If this contract is not void, it is voidable. The mere fact that the infant has received an allowance under the contract does not affect the question whether it is for his benefit. The rule laid down in *De Francesco* v. *Barnum* (1), and approved in *Corn* v. *Matthews* (2), is that the entire contract must be looked at. If, however, it contains provisions so detrimental to the infant as to make the whole contract unfair, it will be set aside. This contract of insurance, assuming it to be part of the contract for service, contains provisions that invalidate it. It limits the amount that can be recovered to a sum quite out of proportion to that which can be recovered under the Employers' Liability Act. It confers no benefits that the infant could not have obtained by insuring elsewhere against accident, and were he so insured, he would be entitled to recover in such an action as this, independently of the question of whether he had received compensation under the insurance or not: *Bradburn* v. *Great Western Ry. Co.* (3) The contract imposes unreasonable restrictions on him. It contains forfeiture and penalty clauses by which an infant cannot bind himself, and the contribution is not certain, for it is not limited to the amount given in the scale, but may be increased under rule 44 to three times that amount. Further, an infant cannot bind himself to submit to arbitration.

[He cited, also, *Reg.* v. *Lord* (4); *Meakin* v. *Morris* (5); *Leslie* v. *Fitzpatrick* (6); *Flower* v. *London and North Western Ry. Co.* (7)]

Shearman, contrà, for the defendants. There is nothing to prevent an infant entering into a contract of insurance if it is

(1) 45 Ch. D. 430.
(2) [1893] 1 Q. B. 310.
(3) Law Rep. 10 Ex. 1.
(4) 12 Q. B. 757; 17 L. J. (M.C.) 181.
(5) 12 Q. B. D. 352.
(6) 3 Q. B. D. 229.
(7) [1894] 2 Q. B. 65.

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for his benefit. The insurance contract in this case was a part of the contract of service. Such a contract is primâ facie binding, and the onus is on the plaintiff to shew that it contains terms which render it invalid. The terms of the contract of insurance are such as the society may reasonably adopt for the protection of their funds, and the advantages to the insured by reason of the contribution of the railway company to those funds, and the fact that the insurance covers all accidents, and not merely such as the railway company would be responsible for, shew that the contract of service taken as a whole was for the plaintiff's benefit. [He cited *Cooper* v. *Simmons.* (1)]

Cur. adv. vult.

June 15. LORD ESHER, M.R. In this case the plaintiff, while under age, became a porter in the employment of the London and North Western Railway Company. He so continued for some time, and then an injury was caused to him in the course of the working of the railway. He has brought an action against the railway company claiming damages, either at common law or under the Employers' Liability Act, on account of the injuries that he has received. The answer given by the defendants to this claim is, that at the time when the plaintiff entered their employment as servant he, as part of the contract of service, agreed that if during the employment any injury arose to him, whether from the negligence of the servants of the company or not, and without any inquiry on this point, he should be compensated in one of two ways, either by a payment during the time which he should be sick or disabled, or in case of permanent injury or death by payment of a fixed sum to him or his representatives respectively. The defendants say that the plaintiff as part of his original contract of service accepted those terms, and at the same time undertook that in such a case he would not look to the company for damages, but would take the agreed compensation under that contract.

At the time when the plaintiff entered into this contract he was an infant, and he was still an infant at the time of the

(1) 7 H. & N. 707; 31 L. J. (M.C.) 138.

accident, and at the time of action brought. He received under that contract payment in accordance with its terms, and without having to shew how the accident arose; but subsequently he brought this action. It is said that the receipt of that money is not to be taken into account, so that what he is claiming is to keep that money, and further to recover full compensation in respect of the injury that had happened to him, as if there were no such contract in existence, and as if he had received no compensation or advantage under it.

That raises this question of law—whether this is a contract which he can now repudiate, he being still an infant. I am of opinion, without going again through the cases that have been cited, that the answer to this proposition depends on whether, on the true construction of the contract as a whole, it was for his advantage. If it was not so, he can repudiate it; but if it was for his advantage, it was not a voidable contract, but one binding on him, which he had no right to repudiate.

It is for the Court under these circumstances to say what is the construction of the contract, and after it has been construed to say whether it is clearly and manifestly for the benefit of the infant. About the construction there can be no doubt; so the question is whether this Court ought to say with the county court and the Divisional Court that this contract was for the benefit of the infant, or to take the opposite view. A Court of Law would know perhaps better than a jury could what advantages the plaintiff obtained under the contract of service, because I take it it is part of the contract of service made by him with the defendants. If there were no such contract, he could not obtain compensation, unless by agreement with his employers, without bringing an action either in the superior Court or the county court, and in that action he would be exposed to the risk of being unable to prove that the accident was the result of negligence of some one for whom the company were responsible. The injuries might, for instance, have arisen from concealed defect of machinery not known to the company, or by pure accident not brought about by any negligence on the part of the company's servants. The burden of proving that it was otherwise would have been on the plaintiff, and that is a burden

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which often cannot be supported. Even if the plaintiff were successful in shewing this and obtained judgment, and the defendants had to pay his costs, it is a matter of common knowledge that the plaintiff would have to incur extra costs beyond those that he would recover. Such extra costs would have to be paid out of the damages which he would recover; and we all know that in a majority of the cases in which only small damages are recovered those damages are seriously encroached on in meeting the extra costs.

The risk of non-success owing to difficulty of proof, and the risk of obtaining but small advantage from a successful action, are both obviated by this agreement, under which, even if it is clear that there is no legal claim which could be enforced against the company, he is still entitled to compensation. Some disadvantages to the infant have been pointed out in the contract; but it does not prevent the contract being for the advantage of the infant that it contains some things that are not to his advantage. If upon consideration of the whole agreement there is a manifest advantage to the infant, he cannot avoid it. Under the circumstances of this case, I have come to the conclusion that the contract was for the benefit of the plaintiff, and binding on him, and its existence is therefore an answer to the claim made in this action. The appeal will, therefore, be dismissed.

KAY, L.J. Some questions have been argued in this case of general interest relating to contracts made by infants. The law which relates to such contracts has been a great deal discussed, perhaps more than was necessary for the decision of the case before us; but it was long ago settled that all such contracts are not void. In Coke upon Littleton, 172 a, the note as to the power of an infant to bind himself by a writing states that there are some exceptions to his general inability, as "an infant may bind himself to pay for his necessary meat, drink, apparel, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." It has been since held, in *Peters* v. *Fleming* (1), that under the term "necessaries" are included such articles as

(1) 6 M. & W. 42.

are useful and suitable to the state and condition of life of the party, and not merely such as are requisite for bare subsistence. It has been clearly held that contracts of apprenticeship and with regard to labour are not contracts to an action on which the plea of infancy is a complete defence, and the question has always been, both at law and in equity, whether the contract, when carefully examined in all its terms, is for the benefit of the infant. If it is so, the Court before which the question comes will not allow the infant to repudiate it. I will take only one or two of the cases that illustrate this. In *Rex* v. *Hindringham* (1), Lord Kenyon said: "I desire it may not be taken for granted that an infant who binds himself apprentice, a contract so notoriously for his own benefit, may put an end to that contract at any time during his minority." He did not decide the question, but he clearly expressed his opinion that an infant was not able to put an end to a contract that was for his benefit. I will only take one more of the cases, that of *Leslie* v. *Fitzpatrick.* (2) There an apprenticeship agreement was pronounced to be not necessarily unfair because of certain unilateral provisions which made against the infant. That was the case of an apprenticeship deed, giving the master power to terminate the agreement in certain events; and Lush, J., in giving the judgment of the Court, said: "If such provisions were at the time common to labour contracts, or were in the then condition of trade such as the master was reasonably justified in imposing as a just measure of protection to himself, and if the wages were a fair compensation for the services of the youth, the contract is binding, inasmuch as it was beneficial to him by securing to him permanent employment, and the means of maintaining himself."

In this case the contract entered into was this. The men in the employ of the London and North Western Railway Company formed an insurance society, the object of which was to compensate any of the members who might sustain an injury, either temporary or permanent, and to pay a fixed sum in the case of the death of any member from accident. The society gives to its members an advantage greater than the law gives, because it enables them to obtain compensation even where the injury was

(1) 6 T. R. 557. (2) 3 Q. B. D. 229.

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not caused by the negligence of the company or of a superior workman under whose control the injured man was working. The compensation fixed may not be so large as the amount that could be obtained from a jury; but there was this advantage, that it would be payable in cases where there would be no remedy against the company nor, possibly, against any one else.

The plaintiff seems to have been in the employment of the company for a week, and then to have signed the form which made him a member of the insurance society. We are told that this is made a condition of service by the company. I think, therefore, that the case has been rightly treated on the footing that this was part of the terms of a labour contract entered into between the plaintiff and the company, and I agree with the Divisional Court that, on examination of the whole contract, it is for the benefit of the infant, although it contains terms that, standing alone, would not be for his advantage. There is, therefore, no right on the part of the infant to repudiate the contract. One of the terms is, that while he was bound by it he would not bring such an action as this. Obviously the railway company, who give nearly one-half the funds which the insurance society has to dispose of, were bound to make that condition in their own interest. This condition is part of the contract which the plaintiff entered into with the railway company, and, as such a clause does not prevent the contract as a whole being for the benefit of the infant he is bound by the condition, and it is an answer to this action.

Suppose, however, as has been argued, that this is not a labour contract, would the same rule apply? I will not attempt to say how far the rule extends, but that it does apply to some contracts that are not contracts of labour is clear from many decided cases. One of the earliest of these was *Earl of Buckinghamshire* v. *Drury* (1), which came in the first place before Lord Henley when Lord Chancellor. (2) That was a case of a settlement made by a young lady who was about to marry. She was entitled to certain property, and a settlement was made which she executed which provided that the settlement should be in lieu of dower. The argument was that that is a thing about which an infant

(1) 2 Eden. 60. (2) *Drury* v. *Drury*, 2 Eden. 39.

could not bind herself, and that the contract was void. The case went to the House of Lords, and the judgments of Lord Hardwicke and Lord Mansfield are given in the second volume of Eden's Reports, p. 60, and the House of Lords, after considering the agreement and seeing that upon the whole it was for the benefit of the infant, supported it and held her bound by it. Buller, J., in *Maddon* v. *White* (1), referring to that case, said this: "Lord Mansfield, in the case of *Drury* v. *Drury* (2), laid it down as a general principle that if an agreement be for the benefit of an infant at the time, it shall bind him. Lord Hardwicke afterwards adopted this rule." That dictum was commented upon by Sir George Jessel in *Martin* v. *Gale.* (3) During the argument he said: "There must be some mistake in the report of what Buller, J., is stated to have said. No case can be found in which Lord Mansfield or Lord Hardwicke had laid down any such general principle." That particular case was not a mere contract, but an attempted assignment of a reversionary estate, and the deed was held not binding on the infant. In *Smith* v. *Lucas* (4), before the same learned judge, the question arose on a marriage settlement, and was how far the wife, being an infant at the time of the settlement which she had executed, was bound by a contract in it. These are the words of the judgment on p. 543: "Then is the covenant void or voidable? I think it is voidable. I cannot help seeing that there may be cases in which such a covenant as this would be for the benefit of the wife." I will refer to one other case, *Edwards* v. *Carter* (5), which lately came before the House of Lords. That was a marriage settlement executed by an infant, and it was held that the contract was one which he might possibly have repudiated if he had done so within a reasonable time after he attained twenty-one, but that he could not be heard to say that he did not know what was in the settlement that he had executed, and that whether he knew or not he was too late to repudiate it at the time when he desired to do so. That decision shews that the contract was not ipso facto void, and the cases to which I have referred establish that

(1) 2 T. R. 159.
(2) See *Earl of Buckinghamshire* v. *Drury*, 2 Eden. 60.
(3) 4 Ch. D. 428.
(4) 18 Ch. D. 531.
(5) [1893] A. C. 360.

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the principle on which infants' contracts are held to be void or only voidable does not apply merely to contracts for necessaries or labour, but extends to other contracts, such as contracts in marriage settlements.

Even if this contract were not, as I think it is, a contract concerning the terms of employment of the infant, I think it would come within the rule that I have been discussing, and that the Court might say that the contract was for the benefit of the infant, and elect for him, while he is an infant, to confirm it, treating it as not being a void contract but at most only voidable.

I think, therefore, that the appeal fails, and that the judgment should be affirmed.

A. L. SMITH, L.J. This is an action by a porter in the service of the London and North Western Railway Company, brought by his next friend, he being a few months under age, against the company, under the Employers' Liability Act, to recover damages for injuries sustained through the alleged negligence of the defendants. The company sets up an agreement which the plaintiff made when he entered into their service whereby, for good consideration, he bound himself not to take action against them. In answer to this defence, the plaintiff replies the plea of infancy. The Court below have found—and in this I think they are quite correct—that when the plaintiff entered the service of the company he agreed to become a subscriber to a society which was then in existence. The objects of the society are stated in rule 3 to be: "To provide pecuniary relief in cases of temporary or permanent disablement, arising from accident occurring while in the discharge of duty, and also in all cases of death." Towards the funds of that society the employé had a deduction made from his wages of 2*d.* a week, and the company subscribed largely thereto. He met with an accident, and for many weeks received pay from the society; but he has now brought an action against the company to recover damages, as if he had never received anything from or been a member of the society.

Under these circumstances, we have to consider whether the suggestion that this contract did not bind the infant is or is not correct. There can be no doubt that primâ facie an infant is

incapable of contracting; but to this rule there are exceptions, and I will read from the judgment of Fry, L.J., in *De Francesco* v. *Barnum* (1), the one applicable to this case. The learned judge having stated the general rule as to the incapacity of an infant to bind himself and enumerated some of the exceptions, said: "There is another exception which is based on the desirableness of infants employing themselves in labour, therefore, where you get a contract for labour, and you have a remuneration of wages, that contract, I think, must be taken to be, primâ facie, binding upon an infant." I take this to be good law. Primâ facie, therefore, this contract is binding upon the plaintiff. It is for the Court, and not for the jury, to determine, as we have already held in *Flower* v. *London and North Western Ry. Co.* (2), whether the contract is for the benefit of the infant; and if the Court should be of opinion that the agreement as a whole is not for his benefit, but that it is unfair that he should be bound by it, then the Court says that it is not binding on him. It was said in *Corn* v. *Matthews* (3) by the Master of the Rolls: "The mere fact of some conditions in the deed being against the apprentice does not enable the Court, on that ground only, to say that the agreement is void. It is impossible to frame a deed as between a master and an apprentice"—which may be read as "infant" in this case, as the principle is the same—"in which some of the stipulations are not in favour of the one and some in favour of the other. But if we find a stipulation in the deed which is of such a kind that it makes the whole contract an unfair one, then that makes the whole contract void." Now, in this deed are there any such stipulations? In my judgment, it is a fair contract for the infant. First of all, no matter how the accident may happen to him, and whether he has a remedy in a Court of Law or not, he is to have payments made to him according to the scale set out in the rules of the society. He avoids litigation, and having, if successful in litigation, to pay costs as between solicitor and client out of the damages he may recover. He avoids also the uncertainty of getting a verdict and the difficulty of establishing a cause of action. In my judgment, the agreement, instead of

(1) 45 Ch. D. 430. (2) [1894] 2 Q. B. 65.
(3) [1893] 1 Q. B. 310.

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being detrimental to the infant, is, on the whole, manifestly to his advantage. The answer which is set up to this agreement, therefore, fails, and the appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Edward Clarke.*
Solicitor for defendants: *C. H. Mason.*

A. M.

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THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF DERBY, APPELLANTS; GRUDGINGS, RESPONDENT.

Local Government—Streets—Expenses of Sewering, Paving, &c.—Summary Proceedings against Frontager—Right to dispute Liability—Apportionment of Expenses, when conclusive—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257.

Sect. 150 of the Public Health Act, 1875, enables an urban sanitary authority, where any street (not being a highway repairable by the inhabitants at large) is not sewered, levelled, paved, &c., to their satisfaction, to give the owners of premises fronting on such street notice requiring them to execute the necessary works within a specified time; and, if such notice is not complied with, the urban authority may themselves execute the work, and recover in a summary manner the expenses incurred by them from the owners in default according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or, in case of dispute, by arbitration. Sect. 257 provides that the apportionment shall be binding and conclusive on the owner unless by written notice he disputes the same within three months.

The owner of premises fronting on a street having failed to comply with a notice, under s. 150, to sewer, &c., the street according to his frontage, the urban authority did the work themselves, and took proceedings before justices to recover the sum apportioned on him by their surveyor. The owner had given no notice, under s. 257, disputing the apportionment within the specified time. At the hearing of the complaint it was shewn that the carriage-way of the street was a highway repairable by the inhabitants at large, but that the footway on which the owner's premises fronted was not:—

Held, on the authority of *Wake* v. *Mayor, &c., of Sheffield* (11 Q. B. D. 291; 12 Q. B. D. 142), that the urban authority had jurisdiction to give the notice and make the apportionment in respect of the footway, and that the owner having failed to dispute the apportionment under s. 257, it was conclusive against him, and he could not at the hearing before the justices dispute his liability to pay any part of the apportioned sum.

Cook v. *Ipswich Local Board* (Law Rep. 6 Q. B. 451) distinguished.

CASE stated under the Summary Jurisdiction Acts by three justices of the peace of the borough of Derby.

The respondent was summoned to appear at a court of sum-

mary jurisdiction and answer a complaint made by the appellants, whereby they sought to recover from him the sum of 15*l.*, being his proportion of expenses incurred by them, as the urban sanitary authority of the borough of Derby, in executing certain works of levelling, paving, metalling, and flagging a street called Boden Street, in that borough.

The following material facts and evidence were stated in the case, as amended:—

The appellants, acting under s. 150 of the Public Health Act, 1875 (38 & 39 Vict. c. 55) (1), caused notices to be served on the

(1) By s. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriage-way footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good, or is not lighted, to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice. . . .

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses.

"The same proceedings may be taken, and the same powers may be exercised, in respect of any street or road of which a part is or may be a public footpath or repairable by the inhabitants at large, as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large."

By s. 4, "street" includes (inter alia) "any footway."

Sect. 257 provides that where any local authority have incurred expenses, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act, such expenses may be recovered, with interest, from any person who is the owner of the premises when the works are completed for which such expenses have been incurred; and "where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same."

By s. 181: "All questions referable to arbitration under this Act may,

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owners of premises fronting on Boden Street, requiring them to sewer, level, pave, and flag that street in the manner specified in such notices.

The respondent was the owner of certain premises fronting on Boden Street, which was a "street" within the meaning of the Act. The notices, plans, sections, estimates, and apportionments required by s. 150 had been duly made, served, and deposited respectively. The respondent had not complied with the notice given to him to do the work. The work had thereupon been done by the appellants, and the amount sought to be recovered had been duly apportioned against the respondent according to the frontage of his premises in manner provided by the Act, and had been duly demanded within six months of the complaint.

The respondent had given no notice, under s. 257, disputing the amount of the apportionment upon him; nor had he appealed to the Local Government Board, under s. 268, nor taken any steps to refer the appellants' claim to arbitration.

In 1871, Boden Street was laid out for building by the then owners of the land. At that time it was situate within the district of the Litchurch Local Board, but was afterwards, by a local Act, included within the borough of Derby. The laying out of the street in 1871 included the footpaths or footways in and along the same; but the footpaths or footways on which the respondent's premises abutted had never been made or paved, though the kerbs and sewers had been put down to the satisfaction of the Litchurch Local Board when the street was first laid out.

The sum of 15*l.* claimed by the appellants was in respect of

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when the amount in dispute is less than 20*l.*, be determined at the option of either party before a court of summary jurisdiction."

By s. 268: "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, ... he may, within 21 days after notice of such decision," appeal to the Local Government Board in the manner prescribed by the section, and "the Local Government Board may make such order in the matter as to the said board may seem equitable, and the order so made shall be binding and conclusive on all parties."

the expense incurred by them in levelling, paving, metalling, and flagging both the carriage-way and the footway of the street. The respondent, at the hearing before the justices, admitted his liability in respect of so much of the claim as represented the cost of levelling, &c., the footway on which his premises abutted, and offered to pay the amount of such cost; but the appellants declined to receive the same, contending that they were entitled to the whole sum apportioned or to nothing. Evidence (which for the purposes of this report it is thought unnecessary to set forth in full) was given that the carriage-way of the street had been taken over by the Litchurch Local Board, and declared to be a highway; that upwards of fifteen years ago the kerbs, grates, and sewers had been laid and the roadway completed; that such work had been done under the supervision of the Litchurch Local Board and to their satisfaction, and that afterwards the board had from time to time done repairs to the carriage-way and watered it and exercised control over it. Evidence tending to shew that the street was not a highway repairable by the inhabitants at large was given on behalf of the appellants. The justices found as facts that, at the time the appellants gave their notice to the respondent, and at the time they executed the work, the carriage-way was a highway repairable by the inhabitants at large within the meaning of s. 150, but that the footways were never taken over by the Litchurch Local Board or by the appellants, and were not highways repairable by the inhabitants at large, and they dismissed the complaint.

The questions for the opinion of the Court were, in substance, whether, upon the above facts and evidence, the justices were justified in their findings and in dismissing the complaint; and whether the respondent, having failed to object to the apportionment, could raise before them any question as to his liability in respect of the carriage-way of the street, or contend that part only of the sum claimed was recoverable.

Frederick Low, for the appellants. The only point which the justices should have considered was whether the whole of the street had become a highway repairable by the inhabitants at large. It is not asserted that it was ever taken over by the urban sanitary

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authority under the powers conferred by the Highway Act of 1835 (5 & 6 Wm. 4, c. 50), or that it was a highway before the passing of that Act. The facts stated in the case did not justify the justices in holding that the carriage-way had become repairable by the inhabitants at large. The local authority could only declare it to be a highway if and when each of the works specified in s. 152 of the Public Health Act, 1875, had been done to their satisfaction, i.e., when it had been "sewered, levelled, paved, flagged, metalled, channelled and made good, and provided with proper means of lighting to the satisfaction of the urban authority": *Attorney General* v. *Bidder*. (1) The case does not find that all those things had been done. If the street is not a highway repairable by the inhabitants at large, the fact that some works have been executed on it before does not prevent the local authority from requiring the frontagers to do the works specified in s. 150. The decision in *Corporation of Portsmouth* v. *Smith* (2) was on a different statute in different terms, and has no application to a case coming under s. 150.

Next, assuming that the carriage-way had become a highway repairable by the inhabitants at large, still the footway had not become so repairable. The justices, therefore, had jurisdiction to entertain the matter; and the respondent, not having disputed the apportionment within the time limited by s. 257, could not take the objection before the justices that the sum apportioned was partly in respect of the expenses of paving, &c., the carriage-way, and that the local authority had no power to call upon him to pay those expenses: *Wake* v. *Mayor, &c., of Sheffield* (3); *Midland Ry. Co.* v. *Watton*. (4) Those cases establish that where any part of the work in respect of which the frontager is called upon to pay has been executed upon a "street" within the meaning of the Act, the urban authority has power to fix the sum to be apportioned, and the justices have jurisdiction to entertain the complaint; but they can only make an order for the apportioned sum. The frontager's only remedy, if he desires to question the amount of the apportionment, is to appeal to the

(1) 47 J. P. 263.
(2) 13 Q. B. D. 184.
(3) 11 Q. B. D. 291, sub nom. *Ex parte Wake*; 12 Q. B. D. 142.
(4) 17 Q. B. D. 30.

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Local Government Board under s. 268 of the Public Health Act, 1875.

Stanger, for the respondent. It is clear that the local authority had no power to give notice to the respondent to execute works on the carriage-way of the street, first, because the facts stated shew that the carriage-way had become a highway repairable by the inhabitants at large; and, secondly, because the work had been done more than fifteen years ago to the satisfaction of the local authority, and they could not, therefore, require the frontagers to do it again: *Bonella* v. *Twickenham Local Board of Health.* (1) The respondent clearly was entitled before the justices to dispute his liability by shewing that the street was a highway repairable by the inhabitants at large: *Hesketh* v. *Atherton Local Board* (2); *Eccles* v. *Wirral Rural Sanitary Authority.* (3) He does not desire to question the amount of the apportionment or to say that the sum which he is called upon to pay is not apportioned correctly as between himself and the other frontagers, but he disputes his liability altogether to any part of the expenses of paving, &c., the carriage-way. The original notice given to him to pave, &c., the street was bad, because it required him to do that which the urban authority had no power to require, and the apportionment founded upon that notice was a nullity for the same reason as was the first apportionment in *Cook* v. *Ipswich Local Board.* (4) *Wake* v. *Mayor, &c., of Sheffield* (5) is distinguishable from this case. There the apportionment had been disputed, and the decision was that the frontager's remedy was to appeal to the Local Government Board. Further, the application was for a certiorari to bring up and quash the magistrate's order, and it was therefore only necessary, in order to dispose of that application, to shew that he had jurisdiction in respect of part of the subject-matter in question. Both in *Wake* v. *Mayor, &c., of Sheffield* (5) and in *Midland Ry. Co.* v. *Watton* (6) the thing required by the notice given to the frontager to be done was, so far as appeared from that notice, within the jurisdiction of the urban

(1) 18 Q. B. D. 577; 20 Q. B. D. 63.
(2) Law Rep. 9 Q. B. 4.
(3) 17 Q. B. D. 107.
(4) Law Rep. 6 Q. B. 451.
(5) 11 Q. B. D. 291, sub nom. *Ex parte Wake;* 12 Q. B. D. 142.
(6) 17 Q. B. D. 30.

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authority. Here it was not, because the frontager was required to do the work on Boden Street which included the carriage-way. A notice which does not sufficiently specify the works required to be done has been held bad: *Parkinson* v. *Mayor, &c., of Blackburn.* (1) Assuming that the frontager in *Wake* v. *Mayor, &c., of Sheffield* (2) could find out from the plans deposited what he was required to do, still, as Lopes, J., pointed out in *Shanklin Local Board* v. *Millar* (3), the provisions of this Act with respect to the deposit of plans are only directory; there is nothing to make such deposit a condition precedent. In *Walthamstow Local Board* v. *Staines* (4) Lindley, L.J. (at p. 613) mentions *Cook* v. *Ipswich Local Board* (5) and *Wake* v. *Mayor, &c., of Sheffield* (2), without disapproving of *Cook's Case.* (5) The question as to the carriage-way in the present case is one of liability only, and not of amount of liability, as in *Wake* v. *Mayor, &c., of Sheffield.* (2) That decision does not apply where the dispute is as to liability only: see the comments of Mathew, J., on *Wake's Case* (2) in *Eccles* v. *Wirral Rural Sanitary Authority.* (6) The justices were right in entering upon the inquiry whether the urban authority had expended the money upon works which they could lawfully call upon the frontager to do: *Reg.* v. *Marsham* (7), see observations of Lord Halsbury, L.C., at p. 376. The surveyor of the urban authority could not entertain the question whether the carriage-way was a highway repairable by the inhabitants at large. All he could do was to make his apportionment; and the respondent could not have raised that question if he had gone to arbitration in order to dispute the apportionment: *Bayley* v. *Wilkinson.* (8)

CHARLES, J. In this case, which has been very fully and ably argued, the justices dismissed a summons taken out by the local authority against the respondent, and the local authority appeal from their order. From the statement of the case, I think it is

(1) 33 L. T. Rep. (O.S.) 119.
(2) 11 Q. B. D. 291, sub nom. *Ex parte Wake*; 12 Q. B. D. 142.
(3) 5 C. P. D. 272, at p. 279.
(4) [1891] 2 Ch. 606.
(5) Law Rep. 6 Q. B. 451.
(6) 17 Q. B. D. 107, at pp. 111, 112.
(7) [1892] 1 Q. B. 371.
(8) 16 C. B. (N.S.) 161; 33 L. J. (M.C.) 161.

quite clear, with respect to a portion of the works which the local authority included in their notice, given under s. 150 of the Public Health Act, 1875, that they were not entitled to require the respondent to execute those works. They gave him a general notice to execute works not only with reference to the footpath of the street, but also with reference to the carriage-way. There are two reasons why they were not entitled to give him that notice with reference to the carriage-way. The first is, that the carriage-way, according to the finding of the magistrates, is now a highway repairable by the inhabitants at large; and, if that is the case, the jurisdiction of the local authority to give the notice indicated by s. 150 is at an end. It was contended that the justices were not warranted in finding in fact that the carriage-way had become a way repairable by the inhabitants at large; but I am not disposed, having regard to the facts which they have found in the original and in the amended case, to question the correctness of the conclusion at which they arrived. It was argued that the facts found were not sufficient to entitle the local authority to give the notice under s. 150, and the case of the *Attorney General* v. *Bidder* (1) was relied on in support of that contention. I can only say that, though it is not very clearly found in the case that everything which s. 152 requires to be done had been done, I think it is sufficiently found; and, the notice having been given, I cannot take upon myself to say that the magistrates were wrong in their finding on this part of the case. The other reason why the local authority were precluded from acting under s. 150 in respect to the carriage-way is that, according to the findings in the case, the carriage-way had already been sewered, levelled, paved, metalled, flagged, channelled, and made good to the satisfaction of the local authority. That being so, I should have thought it clear, even in the absence of authority, that the local authority could not call upon the frontager to do the work again. There is, however, authority for that proposition. It follows from the reasons given by the judges in *Corporation of Portsmouth* v. *Smith* (2), although that case was decided upon a different Act of Parliament; and *Bonella*

(1) 47 J. P. 233. (2) 13 Q. B. D. 184.

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v. *Twickenham Local Board of Health* (1) is an authority upon this very 150th section that, when once the work has been done to the satisfaction of the local authority, they cannot call upon the frontager to do it again. We must, therefore, approach this case on the footing that the notice given by the local authority contains a request that the frontager should do work which request the local authority had no jurisdiction to make. But the notice also contains matter in respect of which they had jurisdiction; because the footway had not become repairable by the inhabitants at large, nor had the work mentioned in s. 150 ever been done upon that footway to the satisfaction of the local authority. This is what happened: an apportionment was made in accordance with the directions of s. 150, and that apportionment was not disputed within the time prescribed by s. 257. The respondent was summoned to pay the amount of the apportionment upon him; and, when the matter came before the justices, he practically admitted his liability so far as the footpath was concerned. He insisted, however, that if the summons, which required him to pay the whole of the apportionment, was persisted in, he had a perfect defence to it on the ground that he was being asked to pay for the work done on a portion of the road in respect of which he had no liability. The justices took that view, and dismissed the summons on that ground. We have now to decide whether they were right in law. Now, there can be no doubt that an apportionment under s. 150 is not conclusive of every defence which can be set up when the frontager is called upon to pay. He may say that the place is not a street, or that he has no premises fronting upon the street, or that the place is a highway repairable by the inhabitants at large. He may set up all those defences, and, as it seems to me, any other defence which offers an answer to the whole of his legal liability. But here he cannot say that he has a defence as to the whole legal liability which is sought to be imposed upon him, because he is admittedly liable in respect of the footpath, and I am of opinion that the question in this case, not being one which goes to the whole of his liability, becomes a question of the

(1) 18 Q. B. D. 577; 20 Q. B. D. 63.

amount of his liability; and, if so, the apportionment, not having been challenged under s. 257, is conclusive. *Cook* v. *Ipswich Local Board* (1) was relied on for the respondent as an authority for the proposition that, if the apportionment is in respect of some matters as to which the frontager has no legal liability, he may raise that partial defence before the magistrates when he is called upon to pay; but when the case is closely examined it does not appear to support that proposition. In *Cook* v. *Ipswich Local Board* (1) the apportionment contained more than it ought to have contained. The frontager was sought to be charged not only in respect of the street to which his premises fronted, but also in respect of another street. The apportionment confused those two streets together, and was therefore, in the opinion of the magistrates, a bad apportionment. Then a further apportionment was made, and it was contended in the Court of Queen's Bench that the fresh apportionment was bad; because, when once an apportionment had been made, a second could not be made. The answer was that the first apportionment was a nullity, and that the surveyor, when he made the second apportionment, was not functus officio, because up to that time he had made no apportionment at all, and the Court took that view. For some time I thought that that decision did support the argument which has been addressed to us for the respondent; but, upon a more careful consideration of the matter, it does not appear to do so, for it must be remembered that the justices have a double function with reference to an apportionment of this kind—they have power, if a summons has been taken out to obtain payment of the apportioned amount, to consider that, and they have also the power, where the amount in dispute is under 20*l.*, if the apportionment is challenged, of determining as arbitrators, under s. 181, whether the apportionment is good or bad, or whether the apportioned amount ought to be paid or not. As appears from Mr. Archibald's argument in *Shanklin Local Board* v. *Millar* (2), that is what the justices did in the *Ipswich Case.* (1) They regarded the first apportionment as a bad one, and a fresh apportionment was made. The first apportionment was not a nullity in the sense of being absolutely void in itself; but it was considered to

(1) Law Rep. 6 Q. B. 451. (2) 5 C. P. D. 272.

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be bad by the justices in their capacity of arbitrators. Denman, J., in his judgment in *Shanklin Local Board* v. *Millar* (1), pointed out that Cockburn, C.J., in the *Ipswich Case* (2) did not mean to say that the first apportionment was an absolute nullity, but only that, under the circumstances, it was one which could not be enforced, and therefore that it was practically a nullity. The Chief Justice does not seem to me to have meant any more than that. Further, the case of *Cook* v. *Ipswich Local Board* (2) came for consideration in *Wake* v. *Mayor, &c., of Sheffield.* (3) There, as here, the argument was pressed upon the Court that the apportionment was an absolute nullity for the same reason as the first apportionment was in *Cook* v. *Ipswich Local Board.* (2) Now the apportionment in *Wake's Case* (3) beyond all doubt included matter in respect of which the local authority had not jurisdiction; because the notice served upon the frontager commanded him to pave &c., not only the street upon which his premises abutted, but also a portion of land which was not part of that street at all. The apportionment therefore was, as in the present case, with reference to matters in respect of which the local authority partly had jurisdiction and partly not. I fail to see any distinction between *Wake's Case* (3) and this. It is said that they are different because the application in *Wake's Case* (3) was for a certiorari to bring up and quash the justices' order, and therefore it was sufficient for the purposes of that decision to say that the justices had jurisdiction over the subject-matter or some part thereof. No doubt the language of Cave and A. L. Smith, JJ., in the Court below seems to afford ground for the distinction. But the reasoning of two, at any rate, of the judges in the Court below and of the Court of Appeal is fatal to the respondent's contention in this case—because, after *Cook* v. *Ipswich Local Board* (2) had been fully discussed, and in the judgment of Lord Esher, M.R., distinguished, it was pointed out that, if there be jurisdiction over part of the subject-matter, the magistrate has jurisdiction to entertain the complaint. The question then arises, What are his powers when he comes to entertain it? In *Wake's Case* (3) the stipen-

(1) 5 C. P. D. 272. (2) Law Rep. 6 Q. B. 451.
(3) 11 Q. B. D. 291; 12 Q. B. D. 142.

diary magistrate was of opinion that the whole of the work was within the jurisdiction of the local authority—in other words, that the whole of the expenditure was upon a street on which the premises fronted. On appeal to quarter sessions, the Recorder of Sheffield was of a different opinion. He held that a part only of the work was within the jurisdiction of the local authority, because he came to the conclusion of fact that some of the work was to be done on a place which was not a street. But, although he came to that conclusion, he confirmed the justices' order, because he thought he had no further jurisdiction in the matter than to say that the apportionment was right. His decision was given on the ground that, where there is original jurisdiction over part of the subject-matter only, the apportionment, if it is not questioned, becomes conclusive, and that the only mode of questioning it is by appeal to the Local Government Board under s. 268. It is true that A. L. Smith, J., in the Court below, does not express any opinion upon that point, although Cave, J., does; but in the Court of Appeal it is undoubtedly part of the judgment of Lord Esher, M.R.—concurred in by Bowen, L.J.—that the apportionment could only be questioned by appeal to the Local Government Board. That opinion has been reiterated by the Master of the Rolls in *Midland Ry. Co.* v. *Watton.* (1) There the frontager had been charged in respect of a longer frontage than he possessed. The Master of the Rolls said: "Assuming there is ground for the complaint which the appellants make as to the apportionment, unfortunately they have not taken the steps required by the section for the purpose of disputing such apportionment, and, therefore, as it seems to me, they are prevented from raising this objection unless they can shew that the surveyor had no jurisdiction to make the apportionment. It was argued that there was an excess of jurisdiction by the surveyor in respect of part of the sum apportioned. But it seems to me that if he had jurisdiction to make an apportionment against the appellants, which it is admitted he had, then the only possible objection is that he made such apportionment incorrectly; but that is only an erroneous exercise of jurisdiction, not an excess of jurisdiction. If he

(1) 17 Q. B. D. 30.

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had made an apportionment on a person who was not a frontager in respect of any land, there would be an excess of jurisdiction; but that is not the present case." Taking the Master of the Roll's judgment in *Wake* v. *Mayor, &c., of Sheffield* (1), together with his observations in *Midland Ry. Co.* v. *Watton* (2), I should not, even if my opinion differed from his, feel at liberty to do anything but act upon those decisions. I confess that my own opinion upon the matter has fluctuated somewhat. The cases are not easy to reconcile; but I am far from saying that my own opinion does differ from that which has been expressed in those two cases in the Court of Appeal. It is plain that we are bound by those decisions; and I therefore—with reluctance, because I feel the hardship upon the respondent—come to the conclusion that he has lost the opportunity of objecting to pay the sum which he is asked to pay in this case, although it be true that the sum apportioned does include something which, if he had taken the right course, he might successfully have objected to. I am of opinion that, having allowed the apportionment to stand without objection, he cannot now take the objection which he does take, because it is an objection, not to liability, but to the amount of liability. I think, therefore, that the case must be remitted to the justices with an expression of our opinion to that effect.

COLLINS, J. I am of the same opinion. I will deal with the case upon the footing that the local authority had no right to make any order for improvement expenses in respect of the carriage-way. That part of the case has been completely dealt with by my brother Charles, and I assume that they had no right to make any order in respect of the carriage-way, but that they had in respect of the footway. The case, then, comes to this: the person summoned was a frontager; in front of his premises was a street, part of which had become repairable by the inhabitants at large and part had not; in respect of that street the local authority had a right, under the Public Health Act, 1875, to order him to do certain things; they gave him a notice to do those things, which notice embraced not only the footway which

(1) 11 Q. B. D. 291; 12 Q. B. D. 142. (2) 17 Q. B. D. 30.

had not become repairable by the inhabitants at large, but also the carriage-way which had become so repairable. The question is, whether that notice was or was not a nullity. I think when the argument for the respondent is sifted it all depends on that one point, whether the original notice given by the local authority was one which they had no power to give, and one which could not found jurisdiction. It was contended, and necessarily contended, for the respondent that the notice was bad, and could not found jurisdiction in the surveyor of the local authority to make an apportionment at all, and could not, therefore, found jurisdiction in the justices to hear a complaint for the non-payment of the sum apportioned. The case of *Wake* v. *Mayor, &c., of Sheffield* (1) seems to me an authority directly in point against that contention, and I have been unable to follow the distinctions which Mr. Stanger drew between that case and this. In *Wake* v. *Mayor, &c., of Sheffield* (1) a notice was served upon the frontager ordering him to pave, &c., certain portions of land which were no part of the street in question. I assume that that notice was in the form given in the schedule to the Public Health Act, 1875 (Sched. IV. Form G); and, if so, it must have prescribed in detail the work which the local authority required the frontager to do, and shewn by reference to plans the places where that work was to be done. Having given that notice, which was the foundation of the subsequent proceedings, the local authority did the work themselves; an apportionment was made, and the frontager was summoned for not paying the amount of that apportionment. The point was taken that the magistrate had no jurisdiction, and, the application being for a certiorari, it became absolutely necessary to decide whether or not the original notice followed by the apportionment gave him jurisdiction to hear and determine the matter. The judges both in the Court below and in the Court of Appeal were of opinion that the magistrate had jurisdiction. The Master of the Rolls was clearly of that opinion. He says that, given a frontager, given a street in front of his premises which requires to have the necessary work done to it, given a notice by the local authority, an apportionment, and a demand for the sum apportioned, then

(1) 11 Q. B. D. 291; 12 Q. B. D. 142.

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you have all the conditions which found jurisdiction. He says further: "It would be without the statute if no order at all could have been made by the local authority, but, if any part of the expenditure had been made in respect of a street within the meaning of the statute, it is obvious that as to that part the local authority might fix the proper sum to be apportioned by the surveyor. Here it cannot be denied that a part of the expenditure was in respect of that which was a street within the meaning of the statute, and that the appellant was a frontager on that street, and it therefore follows that an order might be made upon him which would be an order within the meaning of the statute, and all that could be said against it would be that, although it might lawfully be made, it was a wrong order." In an earlier part of his judgment he pointed out that a remedy in respect of a wrong apportionment, or a wrong order of the local authority, would be to the Local Government Board under s. 268; but at the root of the decision lies the conclusion that the original order made by the local authority was an order within their competence to make, and therefore sufficient to found jurisdiction. If that be so, all the distinctions suggested in argument between *Wake* v. *Mayor, &c., of Sheffield* (1) and this case seem to me to fall to the ground. Here, no doubt, the notice given by the local authority in terms referred to the carriage-way as well as the footway, and I have already said that, as to the carriage-way, there was no power to give the notice. That, however, is no distinction in point of law. In *Wake's Case* (1) the notice, even if it did not in terms embrace the area of the portion of land which was outside the street, must by reference to the plans have pointed out that it extended to that area. If so the two cases are on all-fours, and the matter in each case having come before the magistrates on an apportionment which was not disputed, all the observations of the Master of the Rolls in *Wake's Case* (1) apply here. The only difficulty I have felt has arisen from the decision in *Cook* v. *Ipswich Local Board* (2), a difficulty which arises, not upon the decision itself, but upon a point decided on the road to the final decision. In that case an apportionment had been made in which two streets had been

(1) 11 Q. B. D. 291; 12 Q. B. D. 142. (2) Law Rep. 6 Q. B. 451.

lumped together. Proceedings were taken to dispute that apportionment, and the magistrates treated it as a nullity. The surveyor then proceeded to made a new apportionment, which was the subject of the discussion before the Court. The point, however, was taken that the first apportionment having been made, the jurisdiction of the surveyor to make any subsequent apportionment was ousted. The Court thought that, under the circumstances, the first apportionment might be treated as a nullity, and then proceeded to deal with the second apportionment. At first sight the decision that the first apportionment was a nullity seemed a difficulty in the way of the conclusion at which we are now arriving; but if the case is examined it will be seen that the conclusion that the first apportionment was a nullity was merely a conclusion come to by the magistrates sitting as arbitrators, and dealing with the matter upon the facts before them. That, at all events, was clearly the view that the Court took of the facts, as appears from the statement in argument of Mr. Archibald in *Shanklin Local Board* v. *Millar* (1), which statement was accepted by the Court. That therefore, I think, disposes of the argument based on *Cook* v. *Ipswich Local Board.* (2) I have also found another case in which the very same point arose as in *Cook* v. *Ipswich Local Board* (2), and in which the same decision was given. In *Mayor, &c., of Manchester* v. *Hampson* (3) the local authority embraced in their notice work which they could not legally order to be done. As in *Cook* v. *Ipswich Local Board* (2), they took proceedings to enforce payment of the sum apportioned; those proceedings failed, and they then made a second apportionment. Manisty, J., in giving judgment deals with the very point. He says: "The substance of this case is that the original notice, though erroneous, was not void; and, as the defendant refused to do any of the work, and did not dispute the first apportionment within three months, if the local board had proceeded for a charge upon that apportionment, they would have been strictly entitled to succeed." That is a clear opinion upon the part of Manisty, J., that an apportionment based on a notice which embraced some-

(1) 5 C. P. D. 272. (2) Law Rep. 6 Q. B. 451.
(3) 35 W. R. 334, 591.

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thing which the authority could not legally order to be done is not legally void, but is only erroneous. So that on that point the case is exactly, it seems to me, on all-fours with the present. On the whole, therefore, I have come clearly to the conclusion that this case must go back to the magistrates with an expression of our opinion that the order ought to be made against the frontager.

Judgment for the appellants accordingly.

Leave to appeal.

Solicitors for the appellants: *Satchell & Chapple, for Gadsby & Coxon, Derby.*

Solicitors for the respondent: *Greenfield & Cracknell, for W. Hollis Briggs, Derby.*

W. A.

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May 24.

THE QUEEN *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Support—Compensation for Minerals left Unworked—Arbitration—Mandamus—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 35 *—Railways Clauses Consolidation Act,* 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 78, 81.

The provisions of the Lands Clauses Act, relating to the assessment of compensation, apply to the assessment of compensation under s. 78 of the Railways Clauses Act.

The owners of certain mines, which lay under a railway, having given notice of their intention to work them, the railway company required a certain amount of support to be left. Arbitrators were appointed to settle the amount of compensation to be paid by the railway company in respect of the minerals required to be left unworked, and in respect of the continuous working of the mines being interrupted, and in respect of their being worked under restrictions so as not to affect the railway:—

Held, that the claim of the mine-owners was made under s. 78 of the Railways Clauses Act, and therefore that the provisions of the Lands Clauses Act as to the assessment of compensation applied.

The Court will not refuse to grant a prerogative writ of mandamus in every case in which an action of mandamus would lie.

Reg. v. *Lambourn Valley Ry. Co.* (22 Q. B. D. 463) explained.

RULE NISI for a mandamus to the London and North Western Railway Company.

Messrs. Andrew Knowles & Sons, Limited, were the owners of certain coal-mines which lay beneath part of the Patricroft &

Upton Junction Railway in Lancashire, belonging to the London and North Western Railway Company. The coal-mines had not been acquired by the railway company.

In 1883 the mine-owners gave notice to the railway company of their intention to work these mines, and the railway company marked out upon plans delivered by the company to the mine-owners certain pillars of coal the working of which they considered likely to damage the railway, and duly required the mine-owners not to work the same, and notified their readiness to treat with the mine-owners for the purchase of the same.

Negotiations ensued as to the amount of compensation to be paid to the mine-owners in respect of such pillars of coal by the railway company, but the parties were unable to agree as to the amount, and accordingly, in April, 1893, the mine-owners appointed an arbitrator in the following terms:—

"Whereas under and by virtue of the powers and provisions of the Railways Clauses Consolidation Act, the London and North Western Railway Company lately gave to us the undersigned Andrew Knowles & Sons, Limited, notice in writing that they required to be left for the purpose of their railway and for the support of the Clifton Tunnel of their Patricroft and Clifton Junction Branch Railway, certain mines and seams of coal lying thereunder and belonging to us. And whereas a dispute has arisen between us and the said railway company respecting the amount of purchase-money and compensation to be paid by us to them for our interest in the said mines and seams of coal so required to be left as aforesaid, and for the additional expenses and losses which shall be incurred by us by reason of the continuous working of such mines and seams of coal being interrupted, and by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway. Now, we hereby give notice to the said railway company that we desire to have the amount of such purchase-money and compensation settled by arbitration." The appointment went on to name an arbitrator on the part of the mine-owners "to settle and determine the amount of purchase-money and compensation to be paid to us by the railway company for and in respect of our said interest in the said mines and seams of coal so required

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to be left as aforesaid, and for and in respect of all such additional expenses and losses incurred by us by reason of the continuous working of the said mines and seams of coal being interrupted, and by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway; and for and in respect of all other compensation, damages, losses, and expenses (if any) to which, under and by virtue of the provisions of the said Railways Clauses Consolidation Act, in the circumstances as aforesaid, we may be entitled."

The railway company appointed an arbitrator in similar terms, and the two arbitrators being unable to agree upon an umpire, an umpire was appointed by the Board of Trade at the request of the mine-owners. The arbitration took place in due course. The mine-owners divided their claim, which amounted to over 36,000*l.*, into four heads: (*a.*) For coal left ungotten; (*b.*) For coal prejudicially affected because it could not be reached, or could be only reached with difficulty, in consequence of the coal left ungotten; (*c.*) For coal lost by an outbreak of fire caused, as the mine-owners alleged, by the way in which the pillars of coal were required to be left; (*d.*) For the expenses of extinguishing the fire.

The umpire gave notice that his award was ready, and could be obtained on payment of his costs.

The railway company refused to take up the award, contending that it was an award under the Railways Clauses Act, and not an award under the Lands Clauses Act (1), and, therefore, that they

(1) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 6: "In exercising the power given to the company by the special Act to construct the railway, and to take lands for that purpose the company shall be subject to the provisions and restrictions contained in this Act, and in the Lands Clauses Consolidation Act, and the company shall make to the owners and occupiers of and all other parties interested in any lands taken or used for the purposes of the railway or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners occupiers and other parties, by reason of the exercise as regards such lands of the powers by this or the special Act, or any Act incorporated therewith, vested in the company, and except where otherwise provided by this or the special Act, the amount of such compensation shall be ascertained and

were not bound to take it up, and the mine-owners applied for and obtained this rule for a mandamus to the railway company to take up the award.

H. D. Greene, Q.C., and *Leigh Clare*, shewed cause against the

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determined in the manner provided by the said Lands Clauses Consolidation Act for determining questions of compensation with regard to lands purchased or taken under the provisions thereof, and all the provisions of the said last-mentioned Act shall be applicable to determining the amount of any such compensation, and to enforcing the payment or other satisfaction thereof."

By s. 78: "If the lessee owner or occupier of any mines or minerals lying under the railway or any of the works connected therewith, or within the prescribed distance, or where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner lessee or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working, and upon the receipt of such notice, it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose, and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner lessee or occupier thereof, then he shall not work or get the same, and if the company and such owner lessee or occupier do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

By s. 81: "The company shall from time to time pay to the owner lessee or occupier of any such mines extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner lessee or occupier by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid, or by reason of the same being worked in such manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway, and if any dispute or question shall arise between the company and such owner lessee or occupier as aforesaid touching the amount of such losses or expenses, the same shall be settled by arbitration."

By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 35: "The arbitrators shall deliver their award in writing to the promoters, and the said promoters shall retain the same and shall forthwith on demand at their own expense furnish a copy thereof to the other party to the arbitration, and shall at all times on demand produce the said award and allow the same to be inspected or examined by such party or any person appointed by him for that purpose."

Sect. 68 provides "that where compensation to the extent of more than 50*l.* is claimed it is to be settled by arbitration, or by the verdict of a jury at the option of the claimant."

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rule. The Court will not grant a prerogative writ of mandamus where an action of mandamus can be brought. That was decided in *Reg.* v. *Lambourn Valley Ry. Co.* (1) Secondly, the application is wrongly conceived. The arbitration took place under the Railways Clauses Act, and not under the Lands Clauses Act. Under the former Act there is no duty, such as is imposed by s. 35 of the latter Act, on the railway company to take up the award. The mine-owners' claim is brought under ss. 78 and 81 of the Railways Clauses Act. No doubt if the arbitration took place under the Lands Clauses Act, the company are bound to take up the award: *Reg.* v. *South Devon Ry. Co.* (2) The Railways Clauses Act, however, contains a distinct code for the assessment of compensation under it. Such assessment is by s. 81 to be by arbitration, and there is no section answering to s. 35 of the Lands Clauses Act, compelling the railway company to take up the award. Sect. 6 of the Railways Clauses Act has no application here, as it deals with compensation during the construction of a railway.

Joseph Walton, Q.C., and *Loehnis*, in support of the rule. The Court will not refuse to grant a prerogative writ of mandamus in every case in which an action of mandamus will lie: *Reg.* v. *Lambourn Valley Ry. Co.* (1) is distinguishable. The case there turned on difficult questions of fact and law which could not easily be disposed of upon an argument for a rule for a mandamus. Here the question at issue is simple, and the application for the prerogative writ is the quickest and most convenient course to pursue.

[WRIGHT, J. We need not trouble you further on that point.]

Secondly, the arbitration took place under the Lands Clauses Act. The claim of the mine-owners was made under s. 78 of the Railways Clauses Act, which enacts that in case of dispute as to compensation the amount "shall be settled as in other cases of disputed compensation." That is a plain reference to s. 6 under which disputed compensation is to be settled according to the provisions of the Lands Clauses Act. It has been expressly held that the two sections must be read together

(1) 22 Q. B. D. 463. (2) 20 L. J. (Q.B.) 145.

(per Lord Cairns in *Smith* v. *Great Western Ry. Co.* (1)) If any part of the mine-owners' claim falls under s. 81, it is only as explanatory of and consequent upon their claim under s. 78. It was evidence of the extent to which the mines were injuriously affected. "Arbitration" in s. 81, means arbitration under the Lands Clauses Act, and, therefore, s. 35 of that Act applies even to arbitrations on claims under s. 81.

WRIGHT, J. My brother Cave desires me to express the conclusion at which we have arrived. In this case the railway company's line ran above some mines which the railway company had not acquired. After a time it became evident, as the mines were being worked, that the railway company would require a certain amount of support to be left under their railway, and thereupon, under the provisions of the Railways Clauses Act, ss. 77–85, relating to mines, they gave notice to the mine-owners that they required certain portions of the coal to be left unworked under their railway, and consequently it became their duty to compensate the mine-owners for the coal so left unworked. Thereupon one of the parties appointed an arbitrator to determine matters, which, according to the language of the appointment, covered all the matters mentioned in ss. 78 and 81 of the Railways Clauses Act, and all the later documents refer to the terms of that appointment as governing what the arbitrators and umpire were appointed to do. The umpire seems to have made an award, and now neither party wishes to take it up, and the mine-owners seek by a writ of mandamus to compel the railway company to take up the award, following the practice which has been universal in cases under Lands Clauses Act for something like thirty years, I should think.

To this application two answers are made. Before dealing with them I may observe that the only serious question, so far as the parties know at present, is the question of costs. It may turn out, of course, that there are much more material objections behind; but so far as the parties know, either may be upsetting an award favourable to himself—merely because he wishes or does not wish the arbitrators or umpire to have discretion over

(1) 3 App. Cas. 165, at p. 180.

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the costs. First, it is said that no mandamus lies against the railway company to compel them to take up the award, because mandamus lies to take up awards under the Lands Clauses Act only by virtue of s. 35 of that Act—I apprehend that is right—and it is further truly said that there is no such section as s. 35 in the Railways Clauses Act, and that therefore no mandamus lies. That drives us back upon the question whether this arbitration was really an arbitration under the Lands Clauses Act, in which case mandamus is the proper remedy, subject to the observation which I shall make directly, or under the Railways Clauses Act, under which it is clear that it is not the proper remedy. Before coming to the other point of the case I must deal a little more fully with the first point that is raised. It is said that even if at one time a writ of mandamus was the proper remedy under the Lands Clauses Act it has ceased to be so since the Common Law Procedure Act, 1854, gave a right to a mandamus in an action, and for that the case of *Reg.* v. *Lambourn Valley Ry. Co.* (1) is cited. Of course we deal with that case with all possible respect as a decision which binds us on a matter in pari materiâ, but there the Court was not dealing with a question of this kind. The decision in that case I have never heard questioned as a decision, and I do not suppose it ever will be. It was a dispute whether an action or a prerogative writ of mandamus was the proper remedy in that particular case. But Pollock, B., in the course of his judgment, appears to say that it is an answer to *any* application for a prerogative writ of mandamus if it is shewn that a mandamus could have been granted for the same purpose in an action. I say, and I have said, with the assent of other judges at various times, that that would be unduly to narrow the powers of this Court to grant a prerogative writ of mandamus. There must be many cases in which a prerogative writ of mandamus ought to be granted for the purpose of speedy justice, or other reasons, in which it would be uncertain whether it was possible to achieve the same results in any other way, and if it were possible would take much time and difficulty. I do not think the *Lambourn Valley Case* (1) governs this, and we have no doubt that the practice which has been

(1) 22 Q. B. D. 463.

inveterate for years of enforcing the taking up of these awards under the Lands Clauses Act by a prerogative writ of mandamus is the proper remedy.

Then it is said that the rule must be discharged because the whole proceeding was wrong from first to last; that it ought not to have been taken under the Lands Clauses Act at all; that it ought to have been taken before an arbitrator appointed under the Railways Clauses Act, and in accordance with the machinery provided by the Railways Clauses Act. That depends upon the construction of the Railways Clauses Act itself. It appears to us that so far as the claim is under s. 78 of the Railways Clauses Act, it is clearly a matter which has to be decided according to the machinery of the Lands Clauses Act, because s. 78 says that disputes under it as to the amount of compensation "shall be settled as in other cases of disputed compensation." That is the time-worn phrase in Acts of this kind for referring to compensation under the Lands Clauses Act. We think that the phrase in s. 78 of the Railways Clauses Act refers, either through the medium of s. 6 of the same Act or otherwise, to the practice under the Lands Clauses Act as regards disputed compensation. If it were not so it would be very strange that in matters exactly analogous to the taking of land—because it is taking away for ever a man's right to work his minerals—there would be no option of a jury whatever, and the parties, whether they liked it or not, would be driven to arbitration. There is a presumption in law that parties ought never to be compelled to agree to arbitration, and, unless there is something in the Act which forces us to take a different view, parties in matters of this important nature must be supposed to resort to the ordinary tribunals. On the other hand, so far as the claims, if at all, are under s. 81—if the claims were exclusively under s. 81—that is, if they were claims in respect of damage arising from time to time or if they arose, say twenty years after the transaction took place, they would be settled by arbitration and not under the Lands Clauses Act, for the simple reason that the section says in express terms that such claims shall be settled by arbitration. That is flatly contradictory to saying that they shall be settled under

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the Lands Clauses Act, because the Lands Clauses Act says that they shall be settled by a jury unless the parties otherwise agree. Therefore it is impossible to suppose that a claim arising directly under s. 81 can be intended to be decided by the machinery of the Lands Clauses Act. As my brother has pointed out, there is a very good reason for that, because claims subsequently arising under s. 81 involve a question of fact to be determined by the arbitrator, whether the damage has or has not been sustained, or whether the party has or has not any title to be compensated, which are things that cannot be inquired into under the Lands Clauses Act at all. The whole machinery of the Lands Clauses Act is for the purpose of ascertaining the quantum of compensation, leaving to other tribunals to determine, whether the party claiming has any interest, who is entitled to the compensation, and whether any damage at all has been done. Whatever damage is alleged to have been done, the arbitrators or jury have to assess. That clearly is not the intention of s. 81.

That brings us back to the simple question whether the terms of the reference here are such as to make it appear that the reference was a reference of claims under s. 78, or a reference of claims under s. 81. We have come to the conclusion that, although the terms of the reference are wide enough to include claims under s. 81, they are not intended to be claimed as independent matters arising under s. 81, but they are intended to be claimed in the same way that all sorts of consequential injuries are claimed in every proceeding under s. 68 of the Lands Clauses Act in relation to the injurious affection of land; and that in substance what was submitted to arbitration in this case was the same class of injuries as would have been submitted if the whole inquiry had been under s. 68 of the Lands Clauses Act. In terms the parties split the claim up in the same way as it is split up in s. 81, but we think that that ought not to make any difference.

I forgot to mention at an earlier stage that the expressions of Lord Cairns in *Smith* v. *Great Western Ry. Co.* (1) strongly

(1) 3 App. Cas. 165, at p. 180.

support the view we have taken, at any rate, of the effect of s. 78, and do not in any way, so far as I know, conflict with the view that we have taken of s. 81.

The result is that the whole arbitration was, so far as matters within the scope of the reference were concerned, an arbitration under the Lands Clauses Act, and, that being so, s. 35 of the Lands Clauses Act applies, and a mandamus is the proper remedy; with the consequence that there having been no offer, and so forth, the company will be liable for the costs.

We have been told that, in point of fact, claims were made in the arbitration as to some fire having occurred in the mine, and as to the cost of putting it out and damage of that sort. If those matters had expressly been made separate subjects of reference, I for one should have thought that that took the reference out of the Lands Clauses Act. If parties will refer other things than matters arising under the Lands Clauses Act, the reference ceases to be a reference under that Act. But it is explained now that these matters were not referred in terms to the arbitrators, but were merely part of the shape in which the claim was put, and we do not think that that ought to make any difference.

Rule absolute.

Solicitors for the mine-owners: *Rowcliffes, Rawle & Co., for Fullagar & Hulton, Bolton.*

Solicitor for the railway company: *C. H. Mason.*

A. P. P. K.

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June 4.

LONDON COUNTY COUNCIL *v.* HERRING.

Metropolis—Building Acts—Dangerous Structures—Not adjoining Public Street—Jurisdiction of Magistrate—Order for Demolition—Metropolitan Building Act, 1855 (18 *&* 19 *Vict. c.* 122), *pt.* 2.

A justice of the peace has jurisdiction under s. 73 of the Metropolitan Building Act, 1855, to order the owner of a dangerous structure to take down, repair, or otherwise secure it, even though such structure is not adjacent to a highway, and consequently is not dangerous to the public.

MOTION for mandamus to a metropolitan police magistrate to state a case.

In the months of April and May, 1894, the defendant, who was the owner of certain houses situate in Lambeth, received notices from the London County Council, under s. 72 (1) of the Metropolitan Building Act, 1855 (as amended by 32 & 33 Vict. c. 82, and 51 & 52 Vict. c. 41, part 2), that certain portions of the said houses were in a dangerous state, and requiring him to take down the said dangerous portions. The defendant, having failed to comply with the said notice, was summoned before a police magistrate under s. 73 of the said Act of 1855. The magistrate found that the portions of the premises mentioned in the said notices were in a dangerous state; but he also found that none of the said portions adjoined upon or were near to any highway or public thoroughfare, and were not and could not

(1) By s. 69 of part 2 of the Metropolitan Building Act, 1855, "Whenever it is made known to the commissioners"—who, by virtue of s. 4 of the Metropolitan Building Act, 1869, and s. 40, sub-s. 8, of the Local Government Act, 1888, are now the London County Council—"that any structure is in a dangerous state," they shall require the district surveyor to make a survey.

By s. 72, if the surveyor on completion of the survey gives a certificate that the structure is in a dangerous state, "the commissioners shall cause the same to be shored up or otherwise secured, and a proper hoard or fence to be put up for the protection of passengers, and shall cause notice in writing to be given to the owner or occupier of such structure requiring him forthwith to take down secure or repair the same."

By s. 73, if the owner or occupier fails to comply with the requisition of such notice, on complaint made a justice of the peace may "order the owner or on his default the occupier of any such structure to take down repair or otherwise secure" such structure.

be by reason of their position dangerous to passengers using any highway. It was contended on behalf of the defendant that the jurisdiction given by s. 73 only applied to structures which were dangerous to the public passing along a highway. The magistrate overruled the contention, and ordered the defendant to take down the said dangerous portions of the premises, and he refused to state a case for the opinion of the High Court. The defendant accordingly moved for a rule for a mandamus to the magistrate to state a case.

H. Tindal Atkinson, for the defendant. The object of part 2 of the Metropolitan Building Act, 1855, which relates to dangerous structures, was intended to apply only to dangerous structures which were public nuisances, and to give a summary remedy in cases in which theretofore the only remedy was by indictment. Sect. 72, which provides for "a proper hoard or fence to be put up for the protection of passengers," shews that the Act only contemplated dangerous structures adjoining a highway.

CAVE, J. The magistrate was clearly right in his interpretation of the Act. We ought not throw the slightest doubt upon the matter by granting a rule.

COLLINS, J., concurred.

Rule refused.

Solicitor for the defendant: *Seaton Taylor.*

J. F. C.

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Feb. 6, 9, 10; *March* 2.

[IN THE COURT OF APPEAL.]

KEEP *v.* VESTRY OF ST. MARY'S, NEWINGTON.
AUSTIN *v.* VESTRY OF ST. MARY'S, NEWINGTON.

Metropolis—Obstruction of Streets—Costermongers—Statute—Construction—Repeal by Implication—57 Geo. 3, c. xxix. s. 65—The Metropolitan Streets Act, 1867 (30 *&* 31 *Vict. c.* 134), *s.* 6—*The Metropolitan Streets Act Amendment Act,* 1867 (31 *&* 32 *Vict. c.* 5), *s.* 1.

Sect. 65 of 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), which empowered vestries in the metropolis to take certain summary proceedings against persons placing stalls and goods upon the carriage ways or footways in streets or public places, is not repealed with respect to costermongers by the Metropolitan Streets Act, 1867, s. 6, and the Metropolitan Streets Act Amendment Act, 1867, s. 1, but is still in force.

So *held* by the Court of Appeal (Lindley, Kay, and A. L. Smith, L.JJ.).

Held, by Lindley and A. L. Smith, L.JJ., Kay, L.J., dissenting, that the Metropolitan Streets Act Amendment Act, 1867, s. 1, must be taken to authorize costermongers to carry on their business in the usual way, provided only that they comply with the police regulations, and that if they do so comply they cannot be proceeded against, either under 57 Geo. 3, c. xxix. s. 65, or under 30 & 31 Vict. c. 134, s. 6; but if they violate such regulations they may be proceeded against under either of those statutes.

Summers v. *Holborn District Board of Works* ([1893] 1 Q. B. 612) considered.

APPEAL by the defendants from a decision of a Divisional Court (Hawkins and Lawrance, JJ.) dismissing an appeal from a judgment of the county court judge of Southwark, awarding damages to the plaintiff Keep, a costermonger, in an action for the seizure of his barrow by the defendants.

The barrow was the property of Keep, and was let by him for the day to Austin, who was plaintiff in the second action. On February 25 Austin was selling goods in the course of his business as a costermonger in the Walworth Road, and Keep was standing near him. The defendants' clerk ordered Austin to remove the barrow. This he refused to do, and it was thereupon seized by authority of the defendants. It was not proved that the barrow was causing any actual obstruction to the traffic, nor that Austin was carrying on his business otherwise than in accordance with the police regulations. The county court judge gave damages to Keep, with leave to the defendants to appeal,

and the appeal was dismissed by a Divisional Court without argument on the authority of *Summers* v. *Holborn District Board of Works*. (1) The object of the present appeal was in substance to have that decision reviewed, and to settle the question whether s. 65 of 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act) was still in force. The action by the plaintiff Austin arose from the same circumstances and involved precisely the same question. Judgment having been given in favour of the plaintiff Austin, appeals from the two judgments were consolidated.

Feb. 6, 9, 10. *Avory*, for the appellants. The Divisional Court followed *Summers* v. *Holborn District Board of Works* (1), which decided that the 65th section of the 57 Geo. 3, c. xxix., was impliedly repealed as respects costermongers by the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 6, and the Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1. But that decision was based on an erroneous construction of the Acts referred to. The 6th section of the 30 & 31 Vict. c. 134, as amended by the 1st section of the 31 & 32 Vict. c. 5, does not apply to costermongers' barrows, but only to the loading or unloading of goods. There is, therefore, nothing in it to repeal either expressly or by implication the 65th section of Michael Angelo Taylor's Act: that Act has always been treated as in full force. The Metropolitan Police Act (2 & 3 Vict. c. 47), under which the police regulations were made, enacts (s. 74) that nothing therein contained shall prevent any person from being liable under any other Act; and there is a similar provision in the 30 & 31 Vict. c. 134, s. 27. And the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 73, expressly mentions Michael Angelo Taylor's Act, and incorporates so much of it as was in force and not inconsistent with the Metropolis Management Amendment Act; and up to that time there had been nothing which could repeal Michael Angelo Taylor's Act. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 33, shews that the passing an Act which imposes a different penalty for an offence from that imposed by a former Act does not necessarily repeal the former Act. In *Brackley* v. *Vestry of St. Mary's*,

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Battersea (1), the Court of Appeal held that the vestry had power to seize a barrow and goods under Michael Angelo Taylor's Act. In *Wyatt* v. *Gems* (2) it was decided that s. 65 of Michael Angelo Taylor's Act was not repealed by the Metropolis Management Act, 1855. In *Fortescue* v. *Vestry of St. Mary's, Bethnal Green* (3), s. 72 of Michael Angelo Taylor's Act was held to be impliedly repealed by s. 119 of the Metropolis Management Act, 1855, but in that case the two sections were manifestly inconsistent with each other. In *Fulham Board of Works* v. *Smith* (4) it appears to have been suggested that s. 65 was impliedly repealed by the Metropolis Police Act (2 & 3 Vict. c. 47), s. 60, sub-s. 7, but no effect was given to the suggestion. In *Back* v. *Holmes* (5) the remedies given under different statutes for the same offence were held to be cumulative. It was suggested by the Court during the opening of this case that s. 1 of 31 & 32 Vict. c. 5 might amount to a statutory licence, but the exemption from a penal clause in one statute cannot do away with the prohibition in another statute. The amending Act, 31 & 32 Vict. c. 5, s. 1, appears to have been passed only for the purpose of repealing the concluding part of s. 6 of the former Act. The police do not claim any right to remove barrows, so they have called on the vestries to exercise the powers of Michael Angelo Taylor's Act. Under that Act the vestries had a discretion, and they had exercised it by allowing the barrows to remain where they cause no obstruction. The Metropolitan Streets Act, 1867, gives no discretion, and would have wholly prevented the costermongers from carrying on their business; so to prevent this the later Act provided that s. 6 should not apply to costermongers if they complied with the police regulations. Three important points were overlooked in the Divisional Court: first, the fact that Michael Angelo Taylor's Act was incorporated with the Act of 1862; second, the effect of the Interpretation Act, 1889; third, the effect of non-compliance with the police regulations. If a costermonger observes them he is exempted from s. 6, but if he infringes them he can be proceeded against under Michael Angelo Taylor's Act or the police Acts.

(1) 23 Q. B. D. 486.
(2) [1893] 2 Q. B. 225.
(3) [1891] 2 Q. B. 170.
(4) 48 J. P. 375.
(5) 51 J. P. 693.

W. M. Thompson, and *A. D. H. Johnson*, for the respondent. The history of the legislation on this subject is that for a long time some vestries acted on Michael Angelo Taylor's Act, and some disregarded it, and in some parishes the police acted under 2 & 3 Vict. c. 47, s. 54, sub-s. 6. In these circumstances the Metropolitan Streets Act, 1867, was passed; s. 6 of this Act clearly would apply to goods kept by costermongers in a street in the course of their business. Then came the Metroplitan Streets Act Amendment Act, 1867, the first section of which provides that s. 6 of the former Act shall not apply to costermongers so long as they carry on their business in conformity with the police regulations. In this state of things *Summers* v. *Holborn District Board of Works* (1) was decided, and it was held that s. 65 of Michael Angelo Taylor's Act was impliedly repealed so far as regarded costermongers. The appellants propose to reduce the Metropolitan Streets Act Amendment Act, 1867, to a nullity. That Act authorizes certain things to be done if certain conditions are complied with, and those things are altogether forbidden by the former Act: how can the two Acts stand together?

[KAY, L.J. The Metropolitan Streets Act Amendment Act, s. 1, applies only to "goods:" how can it impliedly repeal an Act which also applies to barrows?]

The meaning of s. 1 of the Act is that if a costermonger complies with the police regulations he may carry on his trade; if he breaks the regulations there is a remedy under s. 6 of the Metropolitan Streets Act, 1867, and also a remedy by a proceeding at common law for a nuisance. The appellants rely on *Brackley* v. *Vestry of St. Mary's, Battersea* (2), but in that case none of the later statutes were referred to, and the case only decided that, assuming Michael Angelo Taylor's Act to be in force, notice was not necessary before seizing a barrow.

Sect. 54, sub-s. 6, of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), is inconsistent with s. 65 of the Act of 1817. All the Acts relating to the subject in question should be construed as one Act: *Reg.* v. *County Court Judge of Essex.* (3)

(1) [1893] 1 Q. B. 612. (2) 23 Q. B. D. 486.
(3) 18 Q. B. D. 638.

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[LINDLEY, L.J. In *Wyatt* v. *Gems* (1) Michael Angelo Taylor's Act was treated as still in force.]

But if two Acts are inconsistent with one another, it is the later enactment that must be followed. The Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), s. 6, and the Metropolitan Streets Act Amendment Act, 1867 (31 & 32 Vict. c. 5), s. 1, exclude the application of the Act of 1817 to costermongers so long as they carry on their business in accordance with the police regulations, and to that extent impliedly repeal s. 65 of the Act of 1817: *Summers* v. *Holborn Board of Works.* (2) Under s. 31 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the rules made by the commissioner of police must be read into the Metropolitan Streets Acts of 1867 as explaining them.

It must be remembered that the metropolitan police did not exist at the date of the Act of 1817. The intention of the legislature in passing the two Acts of 1867 was to vest the management of the streets in the police instead of in the vestries, as previously; and the result of the legislation up to the present time is that a costermonger possesses the privilege, which others do not possess, of being allowed to trade in the streets provided he conforms to the police regulations.

Avory, in reply. *Fulham Board of Works* v. *Smith* (3), and *Back* v. *Holmes* (4), support the view that Michael Angelo Taylor's Act has not been repealed by later legislation. If by the later Acts the legislature had intended to exempt costermongers from the operation of that Act, it would have done so in express terms.

Cur. adv. vult.

1894. Mar. 2. LINDLEY, L.J. This is an action brought in the county court by a costermonger against the defendants for seizing his truck. They justify the seizure under Michael Angelo Taylor's Act, 57 Geo. 3, c. xxix. s. 65. The damages have been assessed at 8*l*. The county court judge gave judgment for the plaintiff, and his decision was affirmed by the Divisional Court without argument, but following *Summers* v. *Holborn Local*

(1) [1893] 2 Q. B. 225.
(2) [1893] 1 Q. B. 612.
(3) 48 J. P. 375.
(4) 51 J. P. 693.

Board (1). Leave to appeal was given. The action is a test action brought in order to have the above decision reconsidered, and the real question is whether the power given by the above Act can now be exercised or not, or, in other words, whether the above section is still in force or has been repealed by later statutes, to any and what extent, as regards costermongers.

The facts are not in dispute. It having been decided in the case referred to that s. 65 of Michael Angelo Taylor's Act was no longer in force, costermongers have assembled with their trucks in such numbers in Walworth Road as seriously to obstruct the traffic along it. The defendants, not being satisfied that they had no power to prevent this obstruction, determined to assert their powers under the above Act, if still in force, and to have their right to do so tried in a Court of law. They therefore gave the plaintiff notice to remove his barrow, and as he refused they seized it; and for this seizure he has brought his action.

Whether, when the plaintiff's barrow was seized, it was actually obstructing the traffic is not clear on the evidence. The question was not left to the jury, both parties desiring that the case should raise the question whether Michael Angelo Taylor's Act was in force or not. For the same reason no question was raised as to whether the plaintiff was or was not acting contrary to the orders of the police. We cannot assume that the plaintiff was obstructing the traffic or disobeying the orders of the police, and we must deal with the case on that footing.

The case turns on a number of Acts of Parliament, which it is necessary to examine with care. The first is Michael Angelo Taylor's Act, passed in 1817—viz., 57 Geo. 3, c. xxix. s. 65. This section, abridged, is to the following effect: If any person shall place any stall, &c., or any goods, &c., on any part of the carriage or footways in any street, or shall place any coach, cart, wain, wagon, dray, wheelbarrow, handbarrow, sledge, truck, or other carriage upon any of the said carriage ways, except for the necessary time of loading or unloading any cart, &c., and shall not immediately remove the same when required by the surveyor of pavements or by any other person employed by the commissioners having control of the pavements . . . it shall be lawful

(1) [1893] 1 Q. B. 612.

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for a justice to issue a summons against any person accused of such offence, or the owner of such goods, carts, &c.; and if the accused person be convicted, he and the owner of such goods, carts, &c., and the master of the person offending, shall forfeit 40*s.* for the first offence and a sum not exceeding 5*l.* for every subsequent offence, and such penalties shall be paid to the treasurer of the Commissioners of Pavements. The section then goes on to enact that not only shall such penalties become payable, but it shall be lawful for any person appointed by the Commissioners of Pavements, without any warrant or other authority than the Act, to seize any such stalls, goods, carts, barrows, &c., together with the horses, &c., if any, belonging to the same, with their harness, &c., and in case any of the goods are perishable or be articles of food, they shall be immediately forfeited, but otherwise the persons seizing the stalls, goods, carts, &c., shall remove the same to some place appointed for their reception, or to some other convenient place, and the same shall be there kept until payment of the above penalties; and in case the things seized are not claimed and the penalties are not paid, it shall be lawful for the commissioners to sell the same and to pay the surplus to the owners, after deducting the penalties and the costs charges and expenses of the seizure, removal, and sale.

It will be seen from this enactment that two distinct methods are provided for putting a stop to the evils referred to in it: (1.) there is a procedure by summons before a magistrate; and (2.) there is the more summary method of seizure by the Pavement Commissioners. The section is so worded as to raise a doubt whether the second procedure is anything more than another method for compelling the offenders to pay the fines imposed upon them for their offences. The power to seize and forfeit perishable goods and articles of food is, however, opposed to this view, and it has been decided that the power to seize and sell may be exercised, although no summons has been issued, but that no fine can be levied or deducted without a conviction by a magistrate: *Brackley* v. *St. Mary's, Battersea.* (1) This power to seize and forfeit, or seize and sell, as the case may be, is an independent power, the improper exercise of which, how-

(1) 23 Q. B. D. 486.

ever, exposes those who abuse it to an action for damages. Further, the power to seize and sell applies as well to goods as to vehicles; both are mentioned, but no distinction is made between the remedies for putting them where they are forbidden to be put. A summons is as much applicable to the one as to the other, and the same is true of the power to seize and sell. The language of the Act shews that the two modes of procedure cannot be used to compel payment by the same person of two fines for the same offence. But one person might be fined in one way and another in the other way. For example, a servant may be fined by a justice, and his master may be fined also, or may have his property seized and sold; and if he is convicted before a magistrate, but not otherwise (see *Brackley's Case* (1)), the proceeds of his property may be applied in paying his fine; but if he is not so proceeded against only the expenses can be deducted. Obstruction of traffic is not made a condition of liability to either procedure, though no doubt one object was to prevent obstruction to traffic.

When this Act was passed the metropolitan police did not exist, and s. 65 has no reference to police.

The preamble to the Act in question shews what its objects were, and the Act applies to the whole of the metropolis within the then bills of mortality and to the parishes of St. Pancras and St. Marylebone, with some few exceptions. The Act is not, however, printed among the public general statutes but among the local and personal statutes; but by s. 148 it is to be deemed and taken to be a public Act, and is to be judicially noticed as such without being specially pleaded.

The question we have to consider is whether s. 65, or, more exactly, whether the power to seize and sell thereby conferred, is still in force. No part of that section has been expressly repealed, but it is contended and, in fact, it has been decided, in *Summers* v. *Holborn Board of Works* (2), that the power in question has been impliedly repealed by later Acts of Parliament—viz., by 30 & 31 Vict. c. 134, s. 6, as explained by 31 & 32 Vict. c. 5, s. 1.

Before examining these two enactments it is necessary to refer

(1) 23 Q. B. D. 486. (2) [1893] 1 Q. B. 612.

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shortly to what has been done by the legislature since 1817 with reference to the management and control of the streets of the metropolis.

In 1839 the Metropolitan Police Act was passed (2 & 3 Vict. c. 47), and by s. 54 of that Act, a penalty of 40s. is imposed for many acts done in streets, and amongst others (by clause 6) for causing any cart, truck, or barrow to stand longer than may be necessary for loading or unloading, or so as wilfully to cause any obstruction in any thoroughfare. This enactment obviously covers some of the ground previously covered by Michael Angelo Taylor's Act, but s. 74 of this same Act of 1839 renders it impossible to treat any part of the Act of 1817 as repealed by it, although no person can be punished twice for the same offence.

So matters remained until 1855, when the first of the Metropolis Local Management Acts was passed. In 1855, by 18 & 19 Vict. c. 120, the management of the metropolis was to a great extent placed under the control of vestries and district boards, and by s. 96, et seq., they are made surveyors of highways and are intrusted with large powers of paving, repairing, and cleaning streets and protecting persons from annoyances in them. But there is no provision in this Act which relates to the same subject-matter as s. 65 of the Act of 1817, and, although s. 247 repeals all local Acts inconsistent with it, there is no ground for saying that s. 65 of the Act of 1817 is impliedly repealed by the Metropolis Management Act, 1855. This was, in fact, decided by *Wyatt* v. *Gems*. (1)

The Metropolis Local Management Act, 1855, has been amended by several subsequent Acts, two of which—viz., 19 & 20 Vict. c. 112, and 21 & 22 Vict. c. 104—were passed before 1862. They, however, in no way affect the subject under consideration.

By the Metropolis Local Management Act of 1862 (25 & 26 Vict. c. 102), the Act of 1817 is expressly referred to, and some at least of the powers of regulating streets and suppression of nuisances thereby conferred are treated as still subsisting (see s. 73), but the language of this section leaves the reader to find out as best he can which of those powers are in force and which not. This rendered it necessary to examine the former Acts,

(1) [1893] 2 Q. B. 225.

which I have accordingly done, and with the result that down to and including the passing of the Act of 1862 there are no grounds for holding that s. 65 of the Act of 1817 had been repealed, and that there are grounds for holding that the legislature recognised it as still in force.

I come now to 1867. In that year two Acts relating to the matter in hand were passed—viz., 30 & 31 Vict. c. 134, s. 6, and 31 & 32 Vict. c. 5, s. 1, which amended it. Sect. 6 of 30 & 31 Vict. c. 134 is as follows: "No goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act or be otherwise allowed to cause obstruction or inconvenience to the passage of the public for a longer time than may be absolutely necessary for loading or unloading such goods or other articles. Any person doing any act in contravention of this section shall be liable for each offence to a penalty not exceeding 40s. For the purpose of this Act the surface of any space over which the public have the right of way that intervenes in any street within the general limits of this Act between the footway and the carriage-way shall, notwithstanding any claim of any person by prescription or otherwise to the deposit or exposure for sale of any goods or other articles on such surface, be deemed to be part of the footway." Sect. 1 of the amending Act provides: "The 6th section of the Metropolitan Streets Act, 1867, prohibiting the deposit of goods in the streets shall not apply to costermongers, street hawkers, or itinerant traders so long as they carry on their business in accordance with the regulations from time to time made by the commissioners of police with the approval of the Secretary of State, and so much of the said 6th section as refers to the surface of any space that intervenes in any street between the footway and the carriage-way is hereby repealed." Sect. 6 of the first of those Acts in no way refers to vehicles of any kind except so far as the words "loading or unloading" introduce the idea of a vehicle of some sort. The Act itself is a Metropolitan Police Act, and is to be read as one with the previous Acts of the same class (see s. 28). As already seen, vehicles had been long previously provided for by s. 54 of the Act of 1839. Sect. 6 of the Act of 1867 relates to goods and other articles for which no

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provision had been made by any of the previous police Acts. The application of s. 6 to goods and not to vehicles appears to me to be manifest, not only from the language of the section itself, but from a study of the series of Acts of which the Act of 1867 is one. This construction of s. 6 is moreover confirmed by s. 1 of the enactment amending it (31 & 32 Vict. c. 5, s. 1), for s. 6 is there referred to as a section prohibiting the deposit of goods in the streets. This is precisely what s. 6 does. That section is not to apply to costermongers, street hawkers, or itinerant traders so long as they carry on their business in accordance with the police regulations.

The effect of those two Acts of 1867 on Michael Angelo Taylor's Act is certainly not easy to discover. They are both police Acts, and there is no apparent intention to interfere with Michael Angelo Taylor's Act. Sect. 28 of the first of these Acts of 1867 and s. 3 of the second link them on to the principal Act of 1839, and s. 74 of that Act shews that it and Michael Angelo Taylor's Act were intended to be both in force.

But although the police Acts from 1839 to 1867 do not, in my opinion, repeal Michael Angelo Taylor's Act, the two Acts of 1867, when read together, appear to me necessarily to exclude the application of that Act to costermongers, street hawkers, and itinerant traders so long as they carry on their business in accordance with the police regulations. The two Acts of 1867 must be read together. I will so read them in order to ascertain their application, first to the deposit of goods, and second to vehicles. Sect. 6 of the first Act of 1867 is a general prohibition against the deposit of goods in streets, applicable to all persons, and s. 1 of the second Act introduces a conditional exception in favour of costermongers, &c. I agree with the view taken by the Court in *Summers* v. *Holborn Board of Works* (1)—that these Acts must not be read in such a way as to render them illusory and deceptive. The second Act of 1867 was obviously passed because the first went too far, and I read the two Acts as amounting to a clear statutory permission to costermongers, &c., to deposit goods in streets so long as they carry on their business in accordance with the police regulations.

(1) [1893] 1 Q. B. 612.

As regards vehicles there is unquestionably more difficulty. I do not know why goods and *articles* are mentioned in s. 6 of the first Act of 1867. The word "articles" is not found in s. 1 of the second Act of 1867, and I am not prepared to say that "articles" means "vehicles." I do not think it does. But the mode in which costermongers carry on their business in the metropolis is perfectly well known, and it is a matter of common knowledge that they cannot carry it on without trucks or barrows. Here, again, I think the second Act of 1867 would be illusory and deceptive if it were not read as a statutory permission by the legislature to costermongers, &c., to carry on their business in the way in which they invariably do carry it on, provided only that they comply with the police regulations. This was the conclusion arrived at in *Summers's Case* (1), for the special case stated that there was no evidence to shew that the costermonger there was acting contrary to the police regulations.

If in that case the Court meant to decide that s. 65 of Michael Angelo Taylor's Act was wholly repealed as to costermongers, &c., I think the Court went too far. But the decision on the facts stated was, in my opinion, correct, and I concur in their view of s. 27 of the first Act of 1867 and in their observations on the phrase "powers conferred by this Act" which occurs in that section.

This view of the construction and effect of the Acts of 1867 is in no way opposed to 52 & 53 Vict. c. 63, s. 33, which was so much relied upon by Mr. Avory in his very able argument. That section enacts (inter alia) that where an act constitutes an offence under two or more statutes the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either of those statutes, but shall not be liable to be punished twice for the same offence. This enactment, when applied to the present case, leads to the following result, viz.: when costermongers, &c., carry on their business in conformity with the police regulations no offence against any Act is committed, and the section has no application; but when costermongers, &c., disobey the police regulations, and also the directions of the vestry having jurisdiction over them, the section in

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question does apply, and such costermongers, &c., can be proceeded against either under the police Acts or under Michael Angelo Taylor's Act, but they cannot be punished twice for the same offence. It is plain from this that the same person cannot be fined under both Acts for the same offence; but in the case supposed I apprehend that he can be fined and have his barrow seized under Michael Angelo Taylor's Act.

As in this case there is no evidence that the plaintiff was disobeying the police regulations the appeal must be dismissed. But I cannot part with the case without expressing my regret that the law on a matter of so much importance to so many persons should be in a state of such obscurity and complexity. Both costermongers and vestries have much to complain of in the existing state of the statute law by which they are governed, and I trust that before long parliament will give the matter the attention which it certainly deserves. The appeal will be dismissed, without costs.

KAY, L.J. By s. 65 of 57 Geo. 3, c. xxix., called Michael Angelo Taylor's Act, it was enacted that if any person should place any goods on the footway or carriage-ways, or any cart, wagon, wheelbarrow, &c., upon the carriage-ways, within the jurisdiction of the Act, except for the necessary time of loading or unloading, and should not remove them when required by the commissioners or other persons having control of the pavements, any justice of the peace for the locality might issue a summons and subject the offender to a fine of 40*s.* for the first offence, or for a subsequent offence not exceeding 5*l.*; and, in addition, the commissioners, &c., might seize the goods or vehicles and detain them until the penalty should be paid.

By 10 Geo. 4, c. 44, in 1829, a new and more efficient system of police for the Metropolitan Police district was established, and in 1839, by the Metropolitan Police Act (2 & 3 Vict. c. 47), various provisions were made for the metropolitan district, and amongst others, by s. 54, every person who caused any cart, &c., truck, or barrow to stand longer than was necessary for loading or unloading was made liable to a penalty of 40*s.* and to be taken into custody by the police without warrant; and

by s. 60 a like penalty of 40*s.* was imposed upon any person who should throw or lay in any thoroughfare coals, &c., or other materials, except building materials, which were to be so placed or enclosed as to prevent mischief. Sect. 74 provides that nothing therein contained should be construed to prevent any person being liable under any other Act to any other or higher penalty, so that no one be punished twice for the same offence.

Then came the Metropolis Local Management Act (18 & 19 Vict. c. 120), which it has been decided did not interfere with 57 Geo. 3, c. xxix.: *Wyatt* v. *Gems.* (1) This is made quite clear by 25 & 26 Vict. c. 102, s. 73, which provided that the powers of 57 Geo. 3, c. xxix., should apply to the metropolis as defined in that Act.

The Metropolitan Street Act (30 & 31 Vict. c. 134), s. 6, enacted, "No goods or other articles shall be allowed to rest on any footway or other part of a street within the general limits of this Act, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public, for a longer time than may be absolutely necessary for loading or unloading such goods or other articles;" and for each offence the penalty is not exceeding 40*s.* Spaces intervening between the footway and carriageway over which the public have a right of way are to be deemed part of the footway for the purposes of the Act. Sect. 27 provides that all powers conferred by that Act shall be deemed to be in addition to and not in derogation of any other powers conferred by any other Act of Parliament, and any such other powers may be exercised as if this Act had not passed; and by s. 28 the Act is to be construed as one with the Metropolitan Police Acts.

I am of opinion that s. 6 does not relate to carts, wagons, or barrows, but only to goods and other articles which may be loaded or unloaded from them.

It seems to have been thought that this provision might unduly interfere with costermongers, street hawkers, and itinerant traders, and accordingly, by 31 & 32 Vict. c. 5, it was provided that the 6th section of the last-mentioned Act, "prohibiting the deposit of goods in the streets, shall not apply to costermongers, street hawkers, or itinerant traders so long as they carry on their

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business in accordance with the regulations from time to time made by the commissioners of police with the approval of the Secretary of State, and so much of the said 6th section as refers to the surface of any space that intervenes in any street between the footway and the carriage-way is hereby repealed."

This Act is to be construed as one with the Act part of which it repeals or suspends. It only relates to the deposit of goods, and has no reference to carts, wagons, or barrows.

The Statute Law Revision Act, 1875 (38 & 39 Vict. c. 66), repeals the last part of the section of 31 & 32 Vict. c. 5, as to the spaces between the footway and carriage-way.

52 & 53 Vict. c. 63, s. 33, provides, "Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of these Acts or at common law, but shall not be liable to be punished twice for the same offence." It would, therefore, be impossible to say that s. 65 of 57 Geo. 3, c. xxix., or any part of it was repealed by 2 & 3 Vict. c. 47, s. 54, or by 30 & 31 Vict. c. 134, s. 6, and this has been decided in several cases. See *Fulham Board of Works* v. *Smith* (1); *Back* v. *Holmes.* (2)

Certain regulations have been made by the commissioners of police and approved by the Secretary of State as to the manner in which costermongers are to carry on their business. One set of these, made in 1869, points out that, so long and so long only as their business is carried on according to them, s. 6 of the Metropolitan Streets Act, 1867, will not apply to them.

I assume that in the present case the regulations of the police have been observed by the plaintiff. What is the consequence? Simply that s. 6 of the Act of 1867 does not apply to him—That is, wherever this costermonger is at liberty to place his barrow, he is not prevented by that statute from depositing goods and articles on the pavement or street; 31 & 32 Vict. c. 5 does not repeal or interfere at all with s. 6 of 30 & 31 Vict. c. 134, except during the time in which the costermonger, &c., is obeying the

(1) 48 J. P. 375. (2) 51 J. P. 693.

police regulations. It does not repeal, it only suspends, the operation of that statute during that time. Of course, it cannot have any larger operation upon any of the other Acts relating to costermongers to which it does not refer. Does it suspend these Acts during the same period? I must assume that before 30 & 31 Vict. c. 134, s. 6, none of the Metropolitan Acts, other than 57 Geo. 3, prohibited the deposit of goods on the pavement or in the street, as was done by the Act 30 & 31 Vict. c. 134, s. 6. The effect, therefore, is that during the suspension of 30 & 31 Vict. c. 134, s. 6, no Act, except 57 Geo. 3, prevents such deposit of goods. If 30 & 31 Vict. c. 134 had never been enacted, or if, being enacted, it had never been repealed or suspended, the powers of 57 Geo. 3 would not have been interfered with. It is argued that they are now interfered with, not because of the suspension of 30 & 31 Vict., but because of the condition attached to that suspension. The mere repeal or suspension of that statute would not have had this effect. It is ascribed entirely to the condition on which the suspension takes place. Is it within the power of a judicial tribunal to hold that, where a statute says while costermongers observe the regulations of the police they shall be relieved from a disability imposed by a particular statute, this relieves them during the same period from other disabilities imposed by a different statute to which no reference is made? At any rate, can such an inference be drawn as to a different disability not referred to or dealt with in any manner in the statute which is suspended? The suspended statute does not deal with their barrows, or with carts, wagons, and the like, only with goods and articles carried upon them. How can a condition attached to its suspension repeal or suspend another statute relating to carts, wagons, or barrows?

In *Brackley* v. *Vestry of St. Mary, Battersea* (1), the 65th section of 57 Geo. 3, c. xxix., came for consideration before the Court of Appeal, and was treated as being in full force. No one seems to have suggested that it was repealed or suspended. In *Summers* v. *Holborn Board of Works* (2), however, the question argued before us arose, and it was decided that the effect of 31 and 32 of Vict. c. 5 was impliedly to repeal 57 Geo. 3, c. xxix.,

(1) 23 Q. B. D. 486. (2) [1893] 1 Q. B. 612.

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s. 65, because it was entirely inconsistent with it. That statute, it was held, said in effect, "If you carry on your business as you are directed by the commissioners of police, nobody shall interfere with you." I am quite unable to take this view. The Acts of 1867 read together, in my opinion, mean only this—no goods shall be allowed to rest upon any footway or street longer than may be necessary for loading or unloading them, except in the case of costermongers, street hawkers, or itinerant vendors, to whom this prohibition is not to apply so long as they carry on their business in accordance with the police regulations.

The power which was given by the 57 Geo. 3 for the seizure of barrows does not seem to me to be inconsistent with this legislation, and, in my opinion, is neither repealed nor suspended by it.

A. L. SMITH, L.J. The question in this case is one of importance to a large body of men who ply their trade in those streets of the Metropolis to which Michael Angelo Taylor's Act, 57 Geo. 3, c. xxix. (1817), applies, and also to the authorities having the control of the streets, the point being whether a costermonger can be dealt with by a vestry under the provisions of s. 65 of that Act when he is carrying on his business in obedience to the regulations made in that behalf by the commissioners of police, approved of by the Secretary of State.

It is not suggested that s. 65 of Michael Angelo Taylor's Act has been expressly repealed, and, in my judgment, for reasons I will now give, it is still in force, unless it be as regards costermongers, street hawkers, and itinerant traders who are carrying on their business in accordance with the regulations of the police. Michael Angelo Taylor's Act was an Act for better paving, improving, and regulating certain streets of the metropolis, and removing and preventing nuisances and obstructions therein. Sect. 65 has been read by Lindley, L.J., and I do not read it again.

It was held by this Court, affirming the judgment of Charles, J., in *Brackley* v. *Vestry of St. Mary, Battersea* (1889) (1), that the power given by this section to the vestry to seize any goods or

(1) 23 Q. B. D. 486.

hand-barrow was not dependent upon there having been a conviction under the prior part of the section.

The point, however, which is now raised, viz., whether this section was still wholly effective, was not taken or alluded to in the case.

It was argued before us, on behalf of the costermongers, that Michael Angelo Taylor's Act was impliedly repealed by s. 54, sub-s. 6, of the Metropolis Police Act, 1839 (2 & 3 Vict. c. 47), whereby it was enacted that every person who should cause any cart, carriage, truck, or barrow to stand longer than might be necessary for loading or unloading, or who by means of any cart, carriage, truck, or barrow should wilfully interrupt any public crossing, or wilfully cause any obstruction in any public thoroughfare, should be liable to a penalty of not exceeding 40s. Apart from this section not covering the identical offences mentioned in s. 65 of Michael Angelo Taylor's Act different answers may be given to this argument. First and foremost, s. 74 of the Act of 1839 expressly enacts that it is not to repeal any local Act containing penalties. Secondly, twenty-three years after the passing of the Police Act of 1839, viz., in 1862, the legislature, in s. 73 of the Metropolis Local Management Act (25 & 26 Vict. c. 102), recognised the then existence of Michael Angelo Taylor's Act, and as late as 1884 Stephen, J., the Lord Chief Justice doubting but not disagreeing, held that the provision about leaving hand-barrows in a street in Michael Angelo Taylor's Act was not repealed by the Police Act: *Fulham Board of Works* v. *Smith.* (1) And, thirdly, that s. 33 of the Interpretation Act, 1889 (52 & 53 Vict. c. 63), enacts: "Where an act or omission constitutes an offence under two or more Acts, or both under an Act and at common law, whether any such Act was passed before or after the commencement of this Act, the offender shall, *unless the contrary intention appears*, be liable to be prosecuted and punished under either or any of these Acts or at common law, but shall not be liable to be punished twice for the same offence," and that no contrary intention in this Police Act appeared.

It is clear to my mind that there has been no repeal by implication of s. 65 of Michael Angelo Taylor's Act by any Act

(1) 48 J. P. 375.

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prior to the Streets Amendment Act, 1867; and what is the effect of this Act when read in conjunction with the Streets Act, 1867, as regards costermongers is now to be decided.

In 1893 the Lord Chief Justice and Cave, J., in the case of *Summers* v. *Holborn District Board of Works* (1), held that s. 65 of Michael Angelo Taylor's Act was repealed by the Metropolitan Streets and Streets Amendment Act of 1867 as regards costermongers. This being a decision upon a case stated by a justice in a criminal matter, no appeal could be had thereon, so the vestry of St. Mary, Newington (the present defendants), determined to raise the same point in a civil action, and thus get to this Court, and, if necessary, to the House of Lords, so as to review the decision in *Summers* v. *Holborn District Board of Works* (1), with which they were dissatisfied.

To bring this about, the vestry seized the plaintiff's barrow in the Walworth Road, purporting to act under s. 65 of Michael Angelo Taylor's Act. The plaintiff (the costermonger) thereupon brought trover for his barrow, and the vestry justified under s. 65, and thus raised the point whether that section can be now relied upon against a costermonger or not.

Although it appears from the evidence that since the judgment in *Summers* v. *Holborn District Board of Works* (1) in February, 1893, the costermongers have been continually breaking the police regulations of December 28, 1869, by what they did with their barrows in the Walworth Road, yet it was not proved that when the plaintiff's barrow was seized by the defendants he was then acting in contravention of the police regulations, and this case must therefore be decided upon the assumption that the plaintiff, when his barrow was taken, was carrying on his business in accordance with the regulations made by the commissioners of police. Now, the Metropolitan Streets Act, 1867 (30 & 31 Vict. c. 134), by s. 6 enacts that no goods or other articles shall be allowed to rest on any footway or other part of a street, or be otherwise allowed to cause obstruction or inconvenience to the passage of the public for a longer time than may be absolutely necessary for loading or unloading such goods or other articles, and any person contravening this

(1) [1893] 1 Q. B. 612.

section is made liable to a penalty of not exceeding 40*s*. It was also enacted that any space between the footway and the carriageway should, notwithstanding any claim of any person by prescription or otherwise to the deposit or exposure for sale of any goods or other articles on such space, be deemed to be part of the footway.

By s. 3 of the Streets Amendment Act of 1867, that Act is to be construed as one with the Streets Act of 1867, and s. 1 of the Amendment Act is as follows: "The 6th section of the Metropolitan Streets Act, 1867, prohibiting the deposit of goods in the streets shall not apply to costermongers, street hawkers, or itinerant traders, *so long as they carry on their business in accordance with the regulations* from time to time made by the commissioners of police with the approval of the Secretary of State."

It will be seen that this Amendment Act of 1867 does not only enact that s. 6 of the Act of 1867 shall not apply to costermongers, &c., but goes further, and as to what is the meaning of what it has enacted further, in my judgment, is the real point in this case.

Now, one thing is clear. If the costermonger does not carry on his business in accordance with the police regulations, then s. 6 is to apply to him, and also, as it appears to me, the s. 65 of Michael Angelo Taylor's Act, for that section is not repealed by s. 6 of the Streets Act, 1867, or by any Act passed prior to the Streets Amendment Act of 1867. If, then, a costermonger cannot bring himself within this last Act and pray in aid its provisions, in my judgment, both s. 65 of Michael Angelo Taylor's Act, as also s. 6 of the Streets Act, 1867, apply to him, and he can be proceeded against under either, so long as he is only proceeded against for the same offence under one.

I will first read s. 6 of the Streets Act, 1867, in the way the vestry say that it should be read, viz., that it only applies to the case of goods, and not to the vehicle containing the goods, and I will then read therein the Streets Amendment Act of 1867 (31 & 32 Vict. c. 5), and see how matters then stand.

These two Acts in my judgment read together as follows: "No goods shall be allowed to rest on . . . any part of a street

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or be otherwise allowed to cause obstruction or inconvenience for a longer time than may be absolutely necessary for loading or unloading such goods excepting in the case of a costermonger carrying on his business in accordance with the regulations of the commissioners of police sanctioned by the Secretary of State, in which case they may." This is the only way I can read these two sections together, and give effect to the words "so long as the costermonger carries on his business in accordance with the regulations from time to time made by the commissioners of police with the approval of the Secretary of State."

If this be not the true reading of this Streets Amendment Act of 1867, when read with the Streets Act, 1867, and s. 65 of Michael Angelo Taylor's Act is left wholly untouched, this piece of legislation is illusory and a sham.

It is true that by it a costermonger who leaves goods in a street longer than is necessary for loading and unloading them, if he obeys the police regulations avoids a penalty ranging from a farthing to 40*s*. Yet if this reading be not correct, and s. 65 of Michael Angelo Taylor's Act is wholly untouched in the same circumstances and for the very same act, he is left liable to a penalty imposed by an Act passed just fifty years before of a minimum of 40*s*., to be increased if the offence is repeated to a possible 5*l*., together with the liability of having his barrow seized and impounded.

I cannot think that this is the true interpretation of this legislation, and in my judgment these two sections of the Acts of 1867, when read together, as I am bound to read them, enact what I have stated as regards costermongers, street hawkers, and itinerant traders.

These sections when so read are manifestly repugnant and contradictory to s. 65 of Michael Angelo Taylor's Act so far as costermongers are concerned. By s. 65, under no circumstances is a costermonger to be allowed to place his goods upon a street after he has been told to remove them, whereas by the two sections of the Acts of 1867 he may so place them if he obeys the police regulations—in other words, by s. 65 of Michael Angelo Taylor's Act, if a costermonger does act it shall be an offence even if he conforms to the regulations of the police,

whereas by the statutes of 1867 if he does the very same act it shall not be an offence if he conforms to the same regulations.

These statutes cannot, as it seems to me, as regards costermongers, stand together, and I also find the contrary intention appearing which is necessary to except the case out of the provisions of s. 33 of the Interpretation Act of 1889, for it seems to me impossible for the legislature to have intended at one and the same time for the same act if a costermonger obeys the regulations of the police he shall and yet shall not be guilty of an offence.

If the question in this case had arisen about the goods of a costermonger left resting in a street for a longer time than necessary for loading or unloading the same, in my judgment the amending Act of 1867 gives the costermonger liberty to carry on his business as regards his goods in accordance with the regulations of the police countersigned by the Secretary of State, and consequently he cannot be interfered with when so doing either by the vestry or the police.

Now comes the next point. Are the appellants, the vestry, right when they say that s. 6 of the Act of 1867 only applies to goods of the costermonger and not to his barrow in which he conveys his goods? It would be a singular result if a costermonger obeying the regulations of the police as to his goods was to be free from molestation by either the vestry or the police, whereas if he obeyed the regulations of the police as to his barrow he was liable to be molested by the vestry. The words of the amending Act of 1867 are "so long as they carry on their business," &c. Surely the business of a costermonger has as much to do with his barrow as with his goods—who ever heard to the contrary?—and I cannot think that the Act when it referred to his carrying on his business had reference only to his goods. I own that much is to be said in favour of the construction of s. 6 of the Act of 1867 only applying to goods; and this is a difficulty. But I am not prepared to place this restricted construction upon it as is contended for by the vestry in view of the result which would thus be brought about. It seems to me that s. 6 is capable of being read as follows: "No article (this may include a hand-barrow, for a hand-barrow is an article) shall

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be allowed to cause obstruction or inconvenience to the passage of the public for a longer time than may be necessary for loading or unloading such article" (i.e., a hand-barrow), and that this section is not necessarily confined to a costermonger's goods as distinguished from the vehicle in which he carries his goods. I am aware that the Amendment Act speaks of goods.

The point taken that that part of s. 6 which deals with the deposit or exposure for sale of any goods or other articles upon the surface between the footway and carriage-way must refer to goods deposited or exposed for sale, and consequently cannot include barrows, in my judgment is not well-founded, for there are many spaces between a footway and carriage-way where hand-barrows and other vehicles are deposited or exposed for sale.

The suggestion of Mr. Avory on behalf of the vestry that the amending Act was passed to repeal the last part of s. 6 and nothing more, is in my opinion untenable. I must also point out that if s. 6 of the Act of 1867 only applies to goods, as the vestry contend, the police regulations made on December 29, 1869, by the commissioners of police of the metropolis and approved by Her Majesty's Principal Secretary of State for regulating the carrying on of the business of costermongers (street hawkers and itinerant traders included) within the metropolis are as illusory as the statute. These regulations deal with the barrows, carts, or stalls of costermongers and how they are to be placed in the streets, which, if the vestry's construction of the Acts of 1867 is correct, should have been made applicable to goods only.

For these reasons I am of opinion that so long as a costermonger carries on his business in accordance with the regulations from time to time made by the commissioners of police with the approval of the Secretary of State, he is at liberty to do so, and he is not liable as regards either his goods or his barrow to be proceeded against under s. 6 of the Act of 1867, or under s. 65 of Michael Angelo Taylor's Act.

If, however, the costermonger does not conform to the police regulations s. 65 of Michael Angelo Taylor's Act, as also s. 6 of the Act of 1867, stand untouched, and he may, as before stated, be proceeded against under either, but only under one for the same offence.

It was said on behalf of the appellants that in the case of *Summers* v. *Holborn District Board of Works* (1) the Court had not had its attention called to the Interpretation Act of 1889 nor to the fact that Michael Angelo Taylor's Act was incorporated into the Metropolis Local Management Act of 1862, and also that the Court had not considered what would be the result if the costermongers had not carried on their business in accordance with the police regulations.

That case was decided upon the admitted fact that the costermongers had obeyed the police regulations.

In my judgment these criticisms do not affect the validity of the judgment arrived at, and I think, if confined to the case of a costermonger who obeys the police regulations, for the reasons above, that it was correct. I agree with Cave, J.'s, construction of the word "powers" in s. 27 of the Streets Act of 1867.

The case of *Fortescue* v. *Vestry of St. Matthew, Bethnal Green*, in May, 1891 (2), which was cited, does not touch this case. In that case s. 72 of Michael Angelo Taylor's Act was held to be repealed by the Metropolitan Building Act, 1855, and the present question did not arise. Nor does the case of *Wyatt* v. *Gems*, in June, 1893 (3), where it was held that s. 65 of Michael Angelo Taylor's Act was not repealed as regards the hanging out articles in front of houses by the Metropolis Management Act, 1855, for in that case the Court had not to deal with the Streets Acts of 1867.

For the reasons above I am of opinion that the pro formâ judgment of the Divisional Court, which was given in accordance with that in *Summers* v. *Holborn District Board of Works* (1) without argument, should be upheld, and this appeal dismissed without costs.

Appeal dismissed.

Solicitors: *Lowless & Co.; F. J. O'B. Hale.*

(1) [1893] 1 Q. B. 612. (2) [1891] 2 Q. B. 170.
(3) [1893] 2 Q. B. 225.

H. C. J.

C. A.
1894
June 29;
July 2.

[IN THE COURT OF APPEAL.]

REISCHER *v.* BORWICK.

Insurance (Marine)—Collision—Proximate Cause of Loss of Ship—Injury—Concurrent Cause—Towage.

A ship was insured against damage from collision with any object, but not against perils of the sea. The ship ran against a snag in a river, and, the collision causing a leak, the ship was anchored and the leak temporarily repaired, so that the ship was out of immediate danger. A tug was sent to tow the ship to the nearest dock for repairs; but the effect of the motion through the water was that the leak was opened again, and the ship began to sink, and was run aground and abandoned:—

Held, that inasmuch as the injury to the ship remained throughout, the collision was the proximate cause of the damage, and that the loss of the ship was covered by the policy.

APPEAL from a judgment of Kennedy, J.

The plaintiff was the owner of the paddle-wheel steam-tug *Rosa*, which was insured by the defendants. The insurance was expressed in the policy to be, "Only against the risk of collision (as per clause attached), and damage received in collision with any object, including ice." The clause attached related to collision with other vessels; the policy did not include "perils of the sea."

During the currency of the policy the *Rosa* was engaged in a trip on the Danube. In the course of her voyage, on March 4, 1892, she came into collision with a floating snag, which first struck the bottom of the ship, and then fouled the port paddle-wheel and caused considerable damage to the machinery of the ship. Among other things, the cover of the condenser was broken, and a hole made in it about twenty square inches in area. The water poured in through the ejection pipes into the condenser, and thence through the hole in the cover into the ship. The captain anchored the ship, and set the pumps to work. He also succeeded in plugging the ejection pipes with wooden plugs; and so long as the ship was at anchor the water was thus prevented from entering the vessel to any dangerous extent. The captain then applied for assistance, and on March 6 a tug was

sent to tow the *Rosa* to the nearest dock for repairs. The tug commenced to tow the *Rosa* on the same evening; but on the morning of March 7, while she was being towed, the water poured in rapidly through the hole in the cover of the condenser, and it was found that the plug in the port ejection pipe had fallen out and the ship was in danger of sinking. The towing was stopped, but the captain was unable to stay the rush of water through the ejection pipe, and, in order to save the lives of the crew, gave orders to the tug to tow the *Rosa* ashore. This was done, and she was grounded on the south bank of the river, where she was abandoned by the plaintiff.

The plaintiff claimed damages for the total loss of the vessel. The defendants paid into Court 37*l.* 10*s.* to cover the damage caused by the collision with the snag up to the time when the vessel was taken in tow by the tug, but denied any liability for the subsequent damage, contending that the proximate cause of that damage was not the collision, but the towing to the port of repair. Kennedy, J., who tried the action without a jury, gave judgment for the whole amount claimed, and the defendants appealed.

Pickford, Q.C., and *J. A. Hamilton*, for the defendants. The *Rosa* was not insured against general perils of the sea; therefore, unless the loss of the ship was occasioned by collision with the snag, it is not covered by the policy. But the collision was not the proximate cause of the loss of the ship. So long as the ship was at anchor it was safe, and the damage might have been more thoroughly repaired without moving it from its anchorage. But as soon as it was put in motion a fresh risk occurred, and the proximate cause of the loss was the wash of the water occasioned by the towing, by which the plug was forced out: *Pink* v. *Fleming* (1); *Dudgeon* v. *Pembroke* (2); *Davidson* v. *Burnand.* (3)

Cohen, Q.C., and *C. C. Scott*, for the plaintiff. The collision with the snag was the proximate cause of the loss of the ship. It is admitted that the loss was occasioned by the hole in the

(1) 25 Q. B. D. 396. (2) Law Rep. 9 Q. B. 561; 1 Q. B. D. 96; 2 App. Cas. 284.
(3) Law Rep. 4 C. P. 117, 121.

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cover of the condenser, which was made by the collision; and that hole was never repaired, and could not be repaired till the ship was taken into dock. The same source of danger remained throughout the whole time, whether the ship was at anchor or in motion.

Pickford, Q.C., in reply.

Cur. adv. vult.

July 2. LINDLEY, L.J. There is no doubt that, in considering the liabilities of underwriters of marine insurance policies, it is a cardinal rule to regard proximate, and not remote, causes of loss. This rule is based on the intention of the parties as expressed in the contract into which they have entered; but the rule must be applied with good sense, so as to give effect to, and not to defeat, those intentions.

The risks insured against in this policy are—"the risk of collision (as per clause attached), and damage received in collision with any object, including ice." The "risk of collision as per clause attached" refers to collisions with other ships, and may be disregarded. The other risk refers to and includes such a collision as took place in the present case—viz., a collision between the ship insured and a snag in the river which she was navigating. She was injured by a peril insured against, and liability to make good that injury has arisen, and is not denied. The extent of that liability is the matter in dispute. Is the liability confined to repairing the injured parts? If not, does the liability extend to making good all loss or damage which is, in fact, attributable to the injury occasioned by the collision? The liability of the underwriters cannot, I think, be restricted to repairing the injured parts, and, indeed, counsel for the underwriters did not seriously contend that it could. If the ship had sunk, and been lost under such circumstances as to render the inference unavoidable that the collision caused the loss, it is plain that the cost of repairing the damage would not be the measure of the liability of the underwriters. The moment, however, that this conclusion is arrived at, it is difficult to see on what principle liability for a loss occasioned by that injury can be excluded, except upon the ordinary principles applicable

to remoteness of damage. The fact that some fresh cause arises, without which the injury would not have led to further loss, is, I think, in such a case far from conclusive. Assume that this ship would have floated in calm water notwithstanding the injury she had sustained by the collision, and suppose that, before such injury could be made good, the water became so rough as to get into her and sink her, by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision, and would fall on the underwriters of a policy worded as this policy is. It may be that such a loss would also be covered by a policy against perils of the sea in the ordinary form; but this does not, in my opinion, shew that no liability attaches under a policy such as the present. Policies may be so worded as to overlap and cover some risk common to them all. The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other; each was as much a proximate cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy. Negligence or mismanagement on the part of those on board the ship is not suggested. To stop up the ejection pipes was right and proper, and, although one of them became unstopped and water reached the injured parts through this unstopped pipe, this was not the result of negligence. All was done that could be done to save the ship and get her out of harm's way, and she sank because, notwithstanding all efforts to keep water out of her, water got into her through the hole in her condenser cover which had been caused by the collision. I feel the difficulty of expressing in precise language the distinction between causes which co-operate in producing a given result. When they succeed each other at intervals which can be observed it is comparatively easy to distinguish them and to trace their respective effects; but under other circumstances it may be impossible to do so. It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury

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Lindley, L.J.

is or can be repaired, the ship is lost by reason of the existence of that injury—i.e., under circumstances which, but for that injury, would not have affected her safety. It follows that if, as in this case, a policy is effected covering such an injury, it will in the circumstances supposed extend to the loss of the ship, for in the case supposed the injury will really be the cause of the loss—the causa causans and not merely the causa sine quâ non. I am not aware of any authority opposed to this view. It is consistent with the judgment in *Pink* v. *Fleming* (1), which is more favourable to the appellants than any other authority cited or known to me. In my opinion, the judgment appealed from is correct, and this appeal must be dismissed, with costs.

LOPES, L.J. This is a policy indemnifying the insurers against "the risk of collision" (by which I understand collision with other ships) "and damage received in collision with any object, including ice." The question is, was there in the circumstances of this case damage received in collision with a snag in the River Danube? It is admitted that damages for the injury sustained by the condenser are recoverable; but it is contended that what subsequently happened was not attributable to the collision as a proximate cause, but to some intervening and independent cause. The facts are these:—[The Lord Justice stated the facts to the effect set forth above, and continued:—]

In cases of marine insurance it is well-settled law that it is only the proximate cause that is to be regarded and all others rejected, although the loss would not have happened without them. Damage received in collision must, therefore, in this case be the proximate cause of the loss to entitle the plaintiff to recover. The damage received in the collision was the breaking of the condenser, and it was the broken condenser which really caused the proximate loss. The tug was continuously in danger from the time the condenser was broken, and the broken condenser never ceased to be an imminent element of danger, though that danger was mitigated for a time by the insertion of the plug in the outside of this vessel. The cause of the damage to the condenser was the collision, and the consequences of the collision

(1) 25 Q. B. D. 396.

—that is, the broken condenser—never ceased to exist, but constantly remained the efficient and predominating peril to which the damage now sought to be recovered was attributable.

It was contended that the towing the tug through the water after the collision was the proximate cause of the loss now sought to be recovered. It was, however, admitted that this was a reasonable and proper act in the circumstances. This may have been a concurrent cause, and one without which the loss would not have happened; but in my judgment it is not, but the broken condenser is, the proximate cause.

DAVEY, L.J. In this case the appellants admit that damage done by water coming through a hole caused by a collision with any object is damage against which the assurers are bound to indemnify the assured. What is the causa proxima of the damage sustained in this case? The only answer seems to me to be the inrush of the water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger. The failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot in my opinion be justly described as the cause of the ultimate damage. I therefore agree in the judgment which has been given.

Appeal dismissed.

Solicitors for the plaintiff: *Vanderpump & Eve.*

Solicitors for the defendants: *Waltons, Johnson, Bubb, & Whatton.*

M. W.

1894
June 26.

IN RE DUNHILL. EX PARTE WILSON.

Bankruptcy—Practice—Appeals from County Courts—Appeal from Incidental Order of Judge of High Court, to what Divisional Court Appeal should be brought—Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 *Vict. c.* 9), *s.* 2—*Bankruptcy Rules,* 1886 *and* 1890, *r.* 134A.

Where the judge of the High Court for the time being exercising bankruptcy jurisdiction refuses to extend the time within which the official receiver should advertise a receiving order made in the county court and under appeal, an appeal from the judge's decision ought to be brought before a Divisional Court constituted to hear appeals from orders of county courts in bankruptcy matters.

APPEAL from an order of Grantham, J., at chambers.

A receiving order having been made in the Windsor County Court, the debtor appealed against that order, and obtained from Pollock, B., at chambers, being the judge for the time being exercising bankruptcy jurisdiction, an order staying for one month the advertisement by the official receiver of the receiving order in the *London Gazette,* with liberty to apply. (1) Before the month expired Grantham, J., at chambers, discharged the order of Pollock, B.

The debtor appealed, and the appeal came for hearing before a Divisional Court (Cave and Collins, JJ.), not being a Divisional Court constituted to hear appeals from county courts. (2)

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 13, "notice of every receiving order stating, &c., shall be gazetted and advertised in a local paper in the prescribed manner."

By rule 182 (1.) of the Bankruptcy Rules, 1886 and 1890, "When a receiving order is made, ... in a county court the registrar shall forthwith give notice thereof to the Board of Trade"; and (2.) "the official receiver shall forthwith send notice thereof to such local paper as the Board of Trade may from time to time direct; or, in default of such direction, as he may select."

(2) By the Bankruptcy Appeals (County Courts) Act, 1884 (47 & 48 Vict. c. 9), s. 2, "an appeal shall lie in bankruptcy matters . . . . from the order of a county court to a Divisional Court of the High Court of Justice, of which the judge to whom bankruptcy business shall for the time being be assigned shall for the purpose of hearing any such appeal be a member."

By the Bankruptcy Rules, 1886 and 1890, r. 134A, "When there is an appeal to the High Court from the order of a county court in a bankruptcy matter, any order or direction incidental thereto, not involving the de-

H. Kisch, for the debtor.

[CAVE, J. Ought not this appeal to be heard before the Divisional Court constituted to hear appeals in bankruptcy matters?]

It is contended that it ought not. Rule 134A of the Bankruptcy Rules, 1886 and 1890, gives the appeal to the High Court generally.

Muir Mackenzie, appeared for the petitioning creditor.

THE COURT were of opinion that the appeal from the order of Grantham, J., ought to be brought before a Divisional Court constituted to hear appeals from orders of county courts in bankruptcy matters, and therefore directed this appeal to stand over for hearing before such Divisional Court.

Order accordingly.

Solicitors for the debtor: *Beyfus & Beyfus.*

Solicitor for the petitioning creditor: *F. Fitz-Payne, for C. R. Thomas, Maidenhead.*

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cision of the appeal, may be given by the judge of the High Court for the time being exercising bankruptcy jurisdiction, but any such order or direction may be discharged or varied by the High Court."

W. A.

C. A

1894
July 10.

[IN THE COURT OF APPEAL.]

DAKIN, APPELLANT; PARKER AND OTHERS, RESPONDENTS.

Licensing Acts—Licence—Renewal—Proceedings where no Notice of Opposition —Objection made in Open Court—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.

An objection to the renewal of a licence, made in open court at the general annual licensing meeting, is a good "objection made" within the meaning of the proviso to s. 42 of the Licensing Act, 1872, although neither the grounds nor the nature of the objection are stated by the objector; and upon such an objection being made the licensing justices have power to postpone the consideration of the application to an adjourned meeting.

Judgment of the Queen's Bench Division (ante, p. 273) affirmed.

APPEAL from the judgment of the Queen's Bench Division (Charles and Bruce, JJ.) on a case stated by justices in quarter sessions on an appeal against a refusal by licensing justices to grant a renewal of an alehouse licence.

The facts are stated in the report of the judgment in the court below, ante, p. 273. The point in the case was whether an objection to the renewal of a licence made in open court at the general annual licensing meeting was a good objection within the proviso to s. 42 of the Licensing Act, 1872, although neither the grounds nor the nature of the objection were stated by the objector. The justices had adjourned the hearing of the application to renew the licence, which they ultimately refused. The Court of Quarter Sessions on appeal granted the renewal on the ground that no objection had been made at the general annual licensing meeting within the meaning of the Licensing Act, 1872, s. 42, and consequently that the subsequent proceedings before the justices were void.

The Queen's Bench Division quashed the order of Quarter Sessions. (1)

The applicant appealed.

Alfred Young, and *Disturnal*, in support of the appeal.

Poland, Q.C., and *W. Russell Griffiths*, for the respondents.

(1) Ante, p. 273.

LORD ESHER, M.R. The point involved in this case is a simple one. The first of these statutes would have had to be construed by itself had the second not been passed, and so far as it is not affected by the second, it must still be read as if there were no second Act. The proviso in s. 42, sub-s. 2, that the licensing justices may, "on an objection being made," adjourn the granting of any licence to a future day, has not been altered by the subsequent Act. It is said that on the true reading of that proviso, an objection must state the grounds, and that as the objection made in this case did not do so, the justices had no power to adjourn the consideration of the case. The answer to this argument is that no such provision is to be found in the Act, and that there is no ground on a supposed view of the policy of the Act for implying such a provision. If, then, the objection made at the licensing meeting need not be supported by a statement of the grounds on which it is made, the objection which is to be considered at the adjourned meeting is that objection so made. This in itself is a sufficient ground for dismissing the appeal without going into the other matters discussed before us, and in the judgment of Charles, J.

KAY, L.J. I entirely agree. The argument in support of the appeal was in the highest degree technical. What happened was, that at the general annual licensing meeting the chief constable stated that there was an objection to the renewal of this licence, but did not state the grounds of the objection. Thereupon the justices adjourned the matter to a future day, and gave notice to the holder of the licence to attend on that day. On the same day the chief constable gave him a formal notice stating the grounds of objection. It is said that the justices had no power to adjourn the case, as the ground of objection was not stated in open court. Unless we can find in the statute of 1872 some provision to that effect, the appeal fails. The statute provides that if an objection is made in the case of a person who has had no notice to attend at the general annual licensing meeting, the justices may adjourn the matter to a future day, and require the presence of the holder of the licence on that day, "when the case will be heard, and the objection considered, as if the notice

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hereinbefore prescribed had been given." If when that day arrives the licensee does not know the grounds of the objection, he may apply for a further adjournment, quite apart from the fact that in the meantime he could have applied to the clerk to the magistrates or the chief constable to ascertain the grounds of objection. This procedure has not been altered by the subsequent Act, and there is no ground for this appeal.

A. L. SMITH, L.J. I am of the same opinion. It has been argued before us that s. 26 of the Act of 1874 has altered s. 42 of the Act of 1872, and on this point I wish to add a few words. Sect. 42 deals with the application of a licensed person for the renewal of his licence. It enacts that the licensee need not attend in person at the general annual licensing meeting unless he is required by the licensing justices so to attend. Sect. 26 of the Act of 1874 simply says that such a requisition shall only be made for some special cause personal to the licensed person to whom it is sent. It is clear to my mind that this is an addendum applicable only to the requisition to appear personally at the general annual licensing meeting, and has no bearing on the other part of the 42nd section. The proceedings were therefore in order, and the appeal fails.

Appeal dismissed.

Solicitors for appellant: *Steadman, Van Praagh, Sims & Co.*

Solicitors for respondents: *Sharpe, Parker, Pritchards, & Barham, for C. A. Carter, Birmingham.*

A. M.

[IN THE COURT OF APPEAL.]

1894
June 16.

HOOD BARRS *v.* CATHCART.

Husband and Wife—Married Woman—Judgment against—Execution limited to Separate Estate—Restraint on Anticipation—Arrears of Income becoming due after Judgment — Receiver, Sequestration, Charging Order — Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 1, 2, 3, 4; *s.* 19.

Where a married woman has separate estate restrained from anticipation, the Married Women's Property Act, 1882, does not enable a judgment to be enforced against arrears of income to which the restraint applies, accruing due after the date of the judgment, either by the appointment of a receiver, by sequestration, by a charging order, or by any kind of process.

APPEALS from two orders of the Divisional Court (Charles and Bruce, JJ.), refusing to set aside orders made at chambers for the appointment of a receiver.

By an order made at chambers on April 3, 1894, Wright, J., appointed W. J. Rodwell to receive the rents, profits, and moneys receivable in respect of the rents, royalties, profits, and moneys due and in arrear from the tenants of the defendant's estates at Wootton and Stourbridge, in respect of a judgment dated April 20, 1893, for the sum of 1492*l.* 18*s.* 1*d.* and interest thereon. The order was to be without prejudice to the rights of any prior incumbrancer. The tenants of the premises were to attorn and pay their rents in arrear and growing rents to the receiver, and the balance, after passing the accounts, was to be paid into court to abide any order of the Court. A schedule was attached to the order giving the names of the tenants and the estimated amount of rents.

Mrs. Cathcart appealed against the order to the Divisional Court on April 19, and her appeal was dismissed.

By an order made at chambers on April 11, 1894, Lawrance, J., appointed W. J. Rodwell to receive the rents, profits, and moneys receivable in respect of the rents due to Mrs. Cathcart on March 25, 1894, from the tenants of her Stourbridge and Wootton estates, and received by Mr. F. W. Lewis, as the defendant's agent, in respect of the judgment of April 20, 1893. The order

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was to be without prejudice to any prior incumbrancer, and the balance, after passing the accounts, was to be paid into court to abide the order of the Court, and was not to be taken out of court without the leave of a judge.

Mrs. Cathcart appealed against this order to the Divisional Court on April 23, and her appeal was dismissed.

The action was founded on contract, and execution was, by the terms of the judgment, limited to the separate property of the defendant not subject to any restriction against anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, the property should be liable to such execution notwithstanding such restraint.

Mrs. Cathcart was entitled, under her marriage settlement, to the income derived from the two estates mentioned in the orders for her life for her separate use, without power of anticipation.

April 30. Mrs. Cathcart in person appealed against the judgment of the Divisional Court, upholding the order of April 3.

Bartley Dennis, and *W. E. Barling*, for the plaintiff. (1)

Cur. adv. vult.

May 28. Mrs. Cathcart, in person, appealed against the judgment of the Divisional Court upholding the order of April 11.

Bartley Dennis, for the plaintiff, pointed out that the only difference between the order of April 3 and that of April 11 was that the second order was made to meet the actual state of facts, as some of the rents due on March 25, 1894, had been paid over to the defendant's agent.

Cur. adv. vult.

1894. June 16. DAVEY, L.J., read the judgment of the Court (Lord Esher, M.R., A. L. Smith and Davey, L.JJ.) in the first appeal. This is an appeal by the defendant, Mrs. Cathcart, from an order of the Divisional Court refusing to set aside an order of Wright, J., of April 3, 1894, appointing one

(1) It will be seen that from the cause mentioned in the judgment the point upon which the case was decided was not fully argued.

Rodwell receiver of the rents, profits, and moneys then due and in arrear from the tenants of Mrs. Cathcart's estates in respect of the judgment debt of April 20, 1893, and interest thereon. The appeal was heard on April 30 before the Master of the Rolls, A. L. Smith, L.J., and myself.

The facts which give rise to the appeal are as follows. On April 20, 1893, judgment was recovered against Mrs. Cathcart, a married woman sued in respect of her separate estate, for a large sum of money and costs. The action was founded on contract, and the judgment is in the form now usual in such cases, which was settled by this Court in *Scott* v. *Morley*. (1)

Mrs. Cathcart was at the date of the judgment, and is, tenant for life of real estate to the rents of which she is entitled for her separate use without power of anticipation. On February 8, 1894, there being then rents in arrear, an order was made for a receiver of such rents, but the judgment was not thereby satisfied. On March 25, 1894, another quarter's or half-year's rents became due. On April 3, 1894, the order complained of was made appointing a new receiver for the purpose of getting at the rents which, at the date of the order, had become in arrear and due from the tenants. The question is whether any arrears of rents becoming due after the date of the judgment, as to which Mrs. Cathcart was at that date restrained from anticipating, could be taken by means of a receiver or sequestrator, appointed after they became due, or by any other means in satisfaction of this judgment. This point was not considered in the Court below, probably because Mrs. Cathcart insists on conducting her own case, and the point was not therefore brought to their attention; and for the same reason we have not had the advantage of having it argued before us, and we have been obliged to investigate it for ourselves. So far as we can ascertain, the point has never been decided in this Court. It is one of considerable importance in all cases not coming within s. 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63).

By s. 1 of the Married Women's Property Act, 1882, it is enacted (sub-s. 2): "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent

(1) 20 Q. B. D. 120.

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of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole . . . . and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

"(4.) Every contract entered into by a married woman with respect to, and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

By s. 19 it is enacted: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, or shall interfere with or render inoperative any restriction against anticipation at present attached, or to be hereafter attached, to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property, to be made or entered into by herself, shall have any validity against debts contracted by her before marriage. . . ."

As regards debts contracted after marriage, therefore, which is the present case, the restraint on anticipation is to be effectual.

Before the Act it was held by this Court in *Pike* v. *Fitzgibbon* (1) that the general engagements of a married woman can be enforced only against so much of the separate estate, to which she was entitled free from any restraint on anticipation at the time when the engagements were entered into, as remains at the time when the judgment is given, and not against separate estate to which she became entitled after the time of the engagements, nor against separate estate to which she was entitled, at the time of the engagements, subject to a restraint on anticipation.

It has been seen that the law, so laid down, has been altered by s. 1, sub-s. 4, of the Married Women's Property Act, 1882, so far as relates to after-acquired separate estate, but has not been altered as to the restraint on anticipation.

(1) 17 Ch. D. 454.

Consistently with the ruling in that case, it was held by this Court in *In re Glanvill* (1) that the Court would not declare a prospective charge on future income of a married woman restrained from anticipation for costs recovered in an action brought by a married woman suing by a next friend before the Act, and the opinion was expressed that nothing could be taken in execution on a judgment for costs against a married woman, recovered in an action by her suing by a next friend, but what she was entitled to at the date of the commencement of the action. "If," said Cotton, L.J., "a married woman restrained from anticipation cannot, even in a case of fraud, give by contract a right against the separate estate which she is restrained from anticipating, she cannot give a right against it by the institution of a suit."

In *Cox* v. *Bennett* (2) it was held by this Court that, under a judgment for costs in an action by a married woman, suing under the Married Women's Property Act without a next friend, payment of them can be enforced against any arrears of her separate income, although subject to a restraint against anticipation, if due at the time when the order to pay costs is made, and not only against separate property to which she is entitled at the commencement of the proceedings. Some of the reasoning of one of the learned judges suggests the inference that a distinction may be drawn between an order for payment of costs and a judgment for debt or damages in an action on contract, on the ground that in the former case the obligation on the married woman arises only upon the judgment. It has also been suggested on the same ground that a distinction may be drawn between debt or damages recovered in an action on contract, and damages recovered in an action founded on tort. The point has not been argued before us, and it is not necessary to express an opinion upon it for the purposes of this case. Whenever the point comes to be considered, perhaps the answer to the suggestion may be found in the directions, contained in the Act of 1882, for the Court to order payment out of the married woman's separate estate, which primâ facie means the separate estate at her disposal at the date of the order.

(1) 31 Ch. D. 532. (2) [1891] 1 Ch. 617.

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It had been already held in *Holtby* v. *Hodgson* (1) that a judgment debt due to a married woman might be attached by her judgment creditor, although the judgment in favour of the married woman (which was for damages in an action for malicious prosecution) was not recovered until after the judgment against her. The question, therefore, may be put in this way. Are the arrears of separate income restrained from anticipation becoming due after the date of the judgment to be treated as separate property acquired after that date free from the restraint? Or is the effect of the restraint to exclude income so circumstanced altogether from the operation of the judgment? There are authorities directly in point, though not binding on this Court, which it will be convenient to consider before expressing an opinion.

In *Claydon* v. *Finch* (2) (before the Act), Bacon, V.C., ordered a dividend on a fund in court, to which a married woman was entitled subject to restraint, to be paid to a sequestrator under a sequestration taken out after the dividend had become due, to enforce orders for payment of costs made by the Divorce Court previously to that date. In *In re Andrews* (3) (after the passing of the Act) Pearson, J., made an order giving trustees leave to retain costs ordered to be paid by a married woman out of her future income, notwithstanding a restraint on anticipation. On the other hand, in *Stanley* v. *Stanley* (1878) (4), Malins, V.C., refused to order costs recovered against a married woman, under a judgment against her husband and herself by a mortgagee of her life estate, to be charged on her separate income, notwithstanding that she had been a party to fraudulently concealing the restraint. It is not expressly stated whether the dividend sought to be charged in this case was due and in arrear, but apparently it was.

In *Chapman* v. *Biggs* (1883) (5) the Divisional Court (Watkin Williams and Mathew, JJ.) discharged two orders to attach income of a married woman restrained from anticipation in the hands of her trustees. In one case the income had been received by the trustees, and was in arrear at the date of the order nisi, and in

(1) 24 Q. B. D. 103.
(2) Law Rep. 15 Eq. 266.
(3) 30 Ch. D. 159.
(4) 7 Ch. D. 589.
(5) 11 Q. B. D. 27.

the other case the income came to the hands of the trustees two days later. The Court did not think this made any difference. Watkin Williams, J., in giving judgment, said: "It seems to me that if this form of execution could be obtained under the circumstances of this case, the restraint on anticipation could always be evaded. It is admitted that at the time of giving the promissory note the female defendant could not legally charge the income of the trust fund to accrue due thereafter; but to allow this sum of money to be attached would in substance be allowing her to anticipate."

In *Draycott* v. *Harrison* (1) the Divisional Court (Mathew and A. L. Smith, JJ.) allowed an appeal against an order made by a county court judge against a married woman under s. 5 of the Debtors Act. The woman had a separate income subject to restraint, and had received income not due at the date of the judgment. The Court held that the income so received was not applicable to the satisfaction of the judgment, and on that ground allowed the appeal. Mathew, J., said: "I think this case is not brought within the intent and meaning of the Act, for the reason that if a married woman were liable to committal for non-payment of the judgment debt out of her separate property which she was restrained from anticipating, the equity doctrine that a judgment against a married woman can be enforced only against such of her separate property as is not subject to restraint upon anticipation would practically be got rid of. In every case the creditor need only wait until the debtor had received money from her trustees, and then apply for an order of committal. In that way the restraint upon anticipation would indirectly, but inevitably, become of no effect."

These cases are therefore directly in point. The case of *Hyde* v. *Hyde* (2), when examined, has no direct bearing on the particular point before us, as in that case the sequestration was not to enforce a previous judgment, but a process of contempt, and was in fact the initiation of the particular proceeding. It was, however, held that the sequestration could not during coverture be enforced against future income.

In this state of the authorities we have to say what the rule

(1) 17 Q. B. D. 147. (2) 13 P. D. 166.

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shall be. The question must be determined by the construction of the Married Women's Property Act, 1882, ss. 2, 19, having regard to the previous state of the law and to the amendments of it made by the Act. It has been argued in some cases that the restraint on anticipation does not fetter the power of the Court to make an order for payment out of a married woman's separate estate in invitam, but merely restrains her own power of alienation. On the other hand, it has been said that the jurisdiction of the Court is measured by the married woman's own power. The former argument is in our opinion concluded by authority binding upon us, and also leaves out of sight the true nature and object of the restraint. The restraint on anticipation is an anomaly introduced by the Court of Chancery for the protection of the married woman against her own acts and her own weakness. She cannot override it by any engagement entered into by her, however solemn or however much to her particular advantage in the circumstances of the case; and, on the other hand, it has been frequently held that the Court cannot make her separate income restrained from anticipation liable to redress a fraud committed by her, however gross. It would therefore, in our opinion, be contrary to principle to hold that, either by suing as plaintiff or by doing any act or suffering any default which renders her liable to be sued, she can free her property from the fetter. So far from modifying the effect of the restraint as it existed before the Act, it appears to us that the Act carefully preserves it to the same extent as it existed previously. But, in truth, this point seems to us concluded by the form of judgment which was adopted and settled as the proper form by this Court in *Scott* v. *Morley*. (1) The Court thereby held itself bound by the restraint on anticipation to as full an extent as the married woman herself. On the construction of the judgment, therefore, we hold that property which was then subject to restraint is excluded from execution on the judgment. If we were to allow successive receivership orders to be issued as the rents or income not due at the date of the judgment fell due, we should be giving an anticipatory operation to the judgment—we should be so far overriding the restraint on anticipa-

(1) 20 Q. B. D. 120.

tion, and we should, in our opinion, be giving a wrong construction to the judgment. There is no magic in making a new order on each occasion. If the object can be effected in substance, it might as well be done by one order empowering the receiver or sequestrator to receive the income or rents as they fall due.

We are of opinion that full effect may be given to the provisions of the Married Women's Property Act, 1882, by holding that the Court has jurisdiction to order the debt, damages, or costs recovered against a married woman to be paid out of any separate estate which at the date of the judgment she has power to make liable for her engagements, including any after-acquired separate estate which is not subject to a restraint against anticipation; but that the Court has no jurisdiction to order payment out of separate income which at the date of the judgment she is restrained from anticipating, although such income may be in arrear or in her hands when execution is sought to be levied against it.

For the purpose of this judgment we have assumed that the restraint on anticipation was gone as to the rents in arrear; but we must not be taken to decide that point or express an opinion upon it. We have preferred to deal with the larger question.

For these reasons, we are of opinion that the orders of Wright, J., and of the Divisional Court, should be discharged with costs.

Appeal allowed.

June 16th. KAY, L.J., read the judgment of the Court (Lord Esher, M.R., Kay, L.J., and A. L. Smith, L.J.) in the second appeal:—

On April 20, 1893, judgment was obtained in an action against Mrs. Cathcart for a sum of money and costs to be taxed, and the judgment proceeded thus: "Such sum and costs to be payable out of her separate property as hereinafter mentioned and not otherwise, and execution herein is limited to the separate property of the said defendant not subject to any restriction against anticipation, unless by reason of s. 19 of the Married Women's Property Act (1882), the property shall be liable to such execution notwithstanding such restraint." On April 11, 1894,

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Lawrance, J., in chambers appointed W. J. Rodwell receiver to receive the rents, profits, and moneys which became due to Mrs. Cathcart on March 25, 1894, from the tenants of her Stourbridge and Wootton estates, and were received by Mr. F. W. Lewis as the defendant's agent, in respect of the judgment, and he was to pass his accounts and pay the balance into court, and it was ordered that the plaintiff was not to take the money out of court without the leave of a judge. On April 12, 1894, Mrs. Cathcart gave notice of appeal from that order. On the 23rd that appeal was dismissed with costs, and execution upon that order was limited to her separate estate not subject to any restriction against anticipation, unless by s. 19 of the Married Women's Property Act, 1882, the property should be liable to such execution notwithstanding such restriction. From that order Mrs. Cathcart now appeals to this Court.

The short question is whether a receiver can be obtained of arrears of income of a married woman which accrued due after the date of the judgment where such income was settled to the separate use of the married woman with the usual restraint upon anticipation.

The restraint of a married woman from anticipating her separate estate was an invention, it is said, of Lord Thurlow, for the protection of a married woman. It has always been carefully guarded against invasion of any kind. In *Pike* v. *Fitzgibbon* (1881) (1), the question was whether future separate property as to which there was no such restraint could be reached, and it was there held that, if at the date of the married woman's contract she had no separate property free from such restraint, an action against her on that contract must fail. She had no power to contract except as to the free separate property to which she was entitled at the time of making the contract. Consequently, if she had no such property at the time when she made that contract, any separate property which she might afterwards acquire could not be affected by the action. So also, if she had free separate property at the time of the contract, only that property could be reached, and not any which she might afterwards acquire.

(1) 14 Ch. D. 837; 17 Ch. D. 454.

The Married Women's Property Act, 1882, was passed after this decision. Sect. 1, sub-s. 1, enables a married woman to hold, acquire, and dispose of any real or personal property "as her separate property in the same manner as if she were a feme sole without the intervention of any trustee." Sect. 1, sub-s. 2, provides that "in respect of and to the extent of her separate property" she may contract and she may sue or be sued in contract, tort, or otherwise "in all respects as if she were a feme sole;" and by sub-s. 3 every contract entered into by her is to be deemed to be a contract with respect to and to bind her separate estate, unless the contrary be shewn. Sub-sect. 4 is in these words: "Every contract entered into by a married woman with respect to and to bind her separate property shall bind, not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Sect. 19 provides that nothing in the Act "shall interfere with or render inoperative any restriction against anticipation." The effect of s. 1, sub-s. 4, is to enable a creditor of a married woman to obtain satisfaction of his claim, not only out of any free separate property which she had at the time of contracting the debt, but also out of any she may afterwards acquire. So, if judgment be obtained in an action, not for breach of contract, but of tort or otherwise, (s. 1), execution may be had, not only against the free separate property which she had at the date of the judgment, but also against any she may acquire after that date. Does this apply to separate property as to which at the time of the contract and judgment she was restrained from anticipation? Of course it does not until the restraint is removed. But, when that restraint is removed, if it is removed, by the income becoming payable, can it be intercepted under this statute before the actual receipt of it by the married woman?

The so-called restraint upon anticipation is a restraint upon alienation. The ordinary form of this restriction in a settlement directs payment of income to the wife for her separate use "and so as that the said (wife) shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise in the way of anticipation, and that her receipts only shall be

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effectual discharges for the same." Any alienation before the fund reaches the wife's hands would seem to be forbidden, although the income might be due to her when the alienation was attempted. The alienation of a capital sum to which the wife is absolutely entitled may be prevented in like manner: *Baggett* v. *Meux* (1); *In re Bown.* (2) There are cases in which the restraint has been treated as being at an end as to income which has become due, but is in the hands of a tenant or trustee, and has not been paid over to the married woman: *Pemberton* v. *M'Gill.* (3) But in these the restriction must have been peculiarly worded. If the restriction in this case is in the ordinary form, a short answer to the claim to appoint a receiver would be that, notwithstanding that the rents are in arrear, they are still subject to the restraint upon alienation, and therefore the creditor could not attach them by any means. But suppose that this is not so, and that in this case income after it becomes due loses the restraint and is free separate property: is it not the intention of s. 19 to prevent this income being affected? Before the Act after-acquired separate property could not be affected at all. The Act enables this to be done, but provides that nothing in the Act shall interfere with or render inoperative any restraint on anticipation. If arrears of income which accrue due after the judgment can be reached in this way, the Act will have interfered with the restraint on anticipation as hitherto understood (see note on p. 112 of Meryon White and Blackburn's treatise upon the Act). The Act of 1882, which for the first time rendered future separate property liable to be affected, contains this proviso in s. 19. If the words of the proviso had been that nothing in the Act should affect separate property as to which there was a restraint upon anticipation, the same argument might still have been raised, because at the time when the receiver was appointed in this case it might be contended that the restraint had ceased to be operative. But this mode of intercepting the income before it reaches the hands of the married woman would enable a vigilant judgment creditor to defeat the object of the restraint in such cases. This is an interference with such restraint

(1) 1 Coll. 138, affirmed 1 Ph. 627. (2) 27 Ch. D. 411.
(3) 1 Dr. & Sm. 266.

which, if it had been intended, should have been expressed in the Act in explicit terms. In the absence of an express enactment to that effect the true conclusion is that this is not the intention or effect of the statute.

But it is necessary to examine the decisions which relate to the question before and since the passing of the Act of 1882.

One of the first cases on the subject seems to be *Claydon* v. *Finch* (1873) (1), where on January 11, 1872, a married woman was ordered to pay the costs of a suit instituted by her husband for restitution of conjugal rights, and a year afterwards, on January 5, 1873, a dividend became due upon a fund in court which was settled to her separate use without power of anticipation. On January 9, before the dividend was paid, a writ of sequestration was issued, and Bacon, V.C., ordered the costs to be paid out of such dividend on the petition of the sequestrators. This was before the Act of 1882. In *In re Andrews* (1885) (2), Pearson, J., ordered that trustees of income settled for the separate use of a married woman without power of anticipation, by a will which came into operation in 1884, should be allowed to retain out of such income their costs of an action against them by her. In *In re Shakespear* (1885) (3), it was held that in the case of a contract by a married woman since the Act of 1882 she must have separate property at the time of the contract, otherwise she cannot contract so as to bind future separate property. If she had such property at the time of the contract, and afterwards committed a breach of the contract, and proceedings are taken against her for such breach, any separate property which she may have at the date of the judgment will be liable for the breach of contract. In *Palliser* v. *Gurney* (1887) (4), the decision in *In re Shakespear* (3) was approved by the Divisional Court, and it was decided that, when anyone sues a married woman for breach of contract, he must prove that she had separate property at the time of the contract. This was approved and followed by the Court of Appeal in *Stogdon* v. *Lee*. (5) Such separate property

(1) Law Rep. 15 Eq. 266.
(2) 30 Ch. D. 159.
(3) 30 Ch. D. 169.
(4) 19 Q. B. D. 519.
(5) [1891] 1 Q. B. 661.

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must, of course, be free from any restraint upon anticipation at the time of the contract: *Harrison* v. *Harrison* (1888) (1); *Leak* v. *Driffield* (1889). (2) In *In re Glanvill* (1885) (3), on further consideration, an action brought by a married woman was held to be useless and improper, and the next friend of the plaintiff was ordered to pay the costs of the defendants. He could not be found, and the Court ordered that such costs should be retained out of income of the married woman which was due to her and was in the hands of the defendants, who were her trustees, but which she was restrained from anticipating. The suit had been commenced before the Married Women's Property Act, 1882, and Cotton, L.J., noticing (on p. 539) that the only income then due had accrued since the order on further consideration, allowed the appeal. The other Lords Justices concurred, all of them reserving their opinion as to the effect of the Act of 1882 if the action had been commenced after that statute. This decision seems to overrule *Claydon* v. *Finch*. (4) In *Hyde* v. *Hyde* (1888) (5), sequestrators under like circumstances were held entitled to arrears due at the time when an order for sequestration was made in 1888; but it was decided that the sequestrators had "no right to demand any separate income not already actually due at the time of the order, as regards which there was an effectual restraint from anticipation." The sequestration in that case was not to enforce payment of money previously owing, but because the married woman had committed a contempt by contumaciously refusing to obey an order of the Divorce Court to deliver up her children. The sequestration therefore only created a pecuniary obligation from the date of the order. In *Cox* v. *Bennett* (6) the married woman in 1890, under the power conferred by the Act of 1882, commenced an action without a next friend in the Queen's Bench Division against the trustees of her father's will to recover 840*l*. This action was stayed, and she then took out a summons for the same purpose in a suit for the administration of her father's property. The summons and action

(1) 13 P. D. 180.
(2) 24 Q. B. D. 98.
(3) 31 Ch. D. 532.
(4) Law Rep. 15 Eq. 266.
(5) 13 P. D. 166.
(6) [1891] 1 Ch. 617.

were both dismissed, with costs, in July and August, 1890, execution being limited to her separate property not subject to any restraint on anticipation "unless by virtue of s. 19 of the Married Women's Property Act, 1882, such property shall be liable to execution notwithstanding such restraint." At the time of such dismissal of the summons the trustees had 304*l.* income in hand, and at the dismissal of the action an additional sum of 55*l.* 3*s.* 7*d.* The trustees applied to be allowed to retain their costs of the summons out of the former sum, and of the action out of both sums. It was held that they might do so, chiefly on the ground that the proceedings had been taken by the married woman after the passing of the Married Women's Property Act, 1882, which distinguished the case from *In re Glanvill* (1), Lindley, L.J., intimating that, in his opinion, if a married woman institutes proceedings since the Act, and is ordered to pay costs, having no separate estate when the proceedings commenced, if at any time afterwards you can find arrears that can be attached, you may attach those arrears, although of course you cannot attach the future income which she is restrained from anticipating, the Act being intended to alter in that respect the law as laid down in *Pike* v. *Fitzgibbon.* (2) It was pointed out, however, in the same case that this consideration was hardly necessary to the decision, because the obligation to pay costs to the opposite party could not exist at the time of bringing the action, when none of the costs were incurred. It could only arise when the order for payment of such costs was made, and the question was as to part of the separate income which was in arrear at the date of that order. In *Whittaker* v. *Kershaw* (1890) (3), a married woman took by assignment from her husband the residuary estate of his deceased father. Part of it consisted of shares in a limited company. The residue was handed over to her, and subsequently a call was made upon the shares which the executors of the father were compelled to pay. After realizing the shares, they brought the action in 1888 for the balance due to them and the costs incurred. At the time of bringing the action the married woman had no free separate

(1) 31 Ch. D. 532. (2) 17 Ch. D. 454.
(3) 45 Ch. D. 320.

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estate, but had some as to which she was restrained from anticipation. The Court of Appeal, recognizing the fact that the action was not for breach of any contract, held that under the words "or otherwise" in s. 1, sub-s. 2, of the Act of 1882, she could be sued, and also decided that her possession of separate estate as to which she was restrained from anticipation was sufficient, Cotton, L.J., saying: "It was urged that Mrs. Kershaw had no separate estate. That is not so. She has separate estate, and although the remedy against it may be defeated by the restraint on anticipation, still she has separate estate." Fry, L.J., said: "There is nothing that deserves consideration in that point." It seems difficult to reconcile this decision with *Palliser* v. *Gurney* (1) and *Stogdon* v. *Lee* (2), and *Leak* v. *Driffield.* (3) In *Pelton Brothers* v. *Harrison* (4) the married woman was sued after the death of her husband, and the judgment was in the same form as in the present case. She had free separate property during the coverture. The Court of Appeal discharged an order for a receiver on the ground that the judgment was limited to her separate property, and, being discovert at the time of the action and the judgment, she had no separate property, and the property which she then had was not within the terms of the judgment. In *Stanley* v. *Stanley* (1878) (5), the married woman joined with her husband in 1873 in obtaining a mortgage of her separate estate, fraudulently suppressing the fact that she was restrained from anticipating it. Judgment was entered against both in 1873, and a charging order was obtained "to charge the next accruing dividend" upon her separate property. The dividend was not due at the date of the charging order. This order was discharged. *Claydon* v. *Finch* (6) was cited, but Malins, V.C., although he found that the wife was a party to the fraud, said: "Notwithstanding this I am bound to hold that in no case and by no device whatever can the restraint upon anticipation be evaded." In *Chapman* v. *Biggs* (1883) (7), the action was upon a promissory note signed by husband and wife.

(1) 19 Q. B. D. 519.
(2) [1891] 1 Q. B. 661.
(3) 24 Q. B. D. 98.
(4) [1891] 2 Q. B. 422.
(5) 7 Ch. D. 589.
(6) Law Rep. 15 Eq. 266.
(7) 11 Q. B. D. 27.

An order was made in chambers to attach in execution income accrued after judgment belonging to the married woman for her separate use which she was restrained from anticipating. The order was rescinded by the judge, and his decision was supported by the Divisional Court on the ground that, if the attachment were allowed, the restraint upon anticipation could always be evaded. The dates are not given, so that it does not appear whether the promissory note and judgment were before or after the Act of 1882. In *Draycott* v. *Harrison* (1886) (1) judgment on a bill of exchange dated in 1884 was recovered against a married woman for 33*l.* She had a small income for her separate use without power of anticipation, and the county court judge made an order for her committal under the Debtors Act, 1869, s. 5, to compel her to pay out of income which she had received. This was reversed by the Divisional Court on the ground that there was no jurisdiction to make such an order, because it would indirectly make the restraint of no effect. In *In re Lumley* (2), North, J., held that, where an order was made against a married woman for payment of costs, the material date was the date of that order, and a sequestration ought not to be issued to obtain income subject to restraint which accrued due after that date. Since the Act of 1882 a judgment in the form used in this case, which was settled in *Scott* v. *Morley* (1887) (3), is a judgment against the married woman which can be made the foundation of a garnishee order, and this was allowed against a sum recovered by the married woman after the date of the judgment in an action by her against a third person for malicious prosecution, which was her separate property without any restraint of anticipation: *Holtby* v. *Hodgson* (1889). (4) But such a judgment cannot be enforced against a married woman by a bankruptcy notice: *In re Hannah Lynes.* (5) In the case of property recovered or preserved a charging order against a married woman may likewise be obtained by her solicitor: *Harrison* v. *Harrison* (6); but whether it would be granted against arrears of

(1) 17 Q. B. D. 147.
(2) W. N. (1894) 77, corrected at p. 80.
(3) 20 Q. B. D. 120.
(4) 24 Q. B. D. 103.
(5) [1893] 2 Q. B. 113.
(6) 13 P. D. 180.

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income which income was subject to a restraint on anticipation must depend upon the answer to the question now to be considered.

On the whole it does not appear that this question has been deliberately decided in any case so as to be binding upon the Court of Appeal. In our opinion it was not intended by the Act of 1882 to enable a judgment against a married woman to be enforced against arrears of her separate estate accruing due afterwards, as to which she was restrained from anticipation, either by a receiver, sequestration, charging order, or any kind of process. We are therefore of opinion that this order for a receiver should be discharged with costs here and below, and any money in the receiver's hands or which has been paid into court by the receiver should be paid out to Mrs. Cathcart.

With respect to contracts entered into by a married woman after December 5, 1893, it is enacted by the Married Women's Property Act, 1893, that they may have effect against her free separate property subsequently acquired, though she has none at the date of the contract, and may be enforced by process of law against all property she may thereafter have while discovert. But property which she is restrained from anticipating is excepted. When she herself institutes any action or proceeding the Court may order the costs of the opposite party to be paid out of property which is subject to such restraint, and enforce such payment by receiver and sale. This statute, although it alters the law as laid down in the cases which have been cited in some respects, does not seem to affect, as to future contracts and judgments, the question decided in this case.

Appeal allowed.

Solicitors for the plaintiff: *Hood Barrs & Co.*

A. M.

ROBINSON, KING & CO. *v.* LYNES.

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July 13.

Husband and Wife—Married Woman—Contract made before Marriage—Personal Liability on.

The personal liability of a married woman at common law upon contracts made by her before marriage is not taken away by the Married Women's Property Act, 1882.

APPEAL from chambers.

The defendant, a married woman, was sued upon a bill of exchange accepted by her before marriage.

On an application by the plaintiffs for summary judgment under Order XIV., the only fact alleged by the defendant by way of defence in her affidavit was that she was a married woman who had married since the date of the acceptance. The master gave unconditional leave to defend. On appeal, the judge, Charles, J., referred the matter to the Divisional Court.

Turrell, (*Kisch*, with him), for the plaintiffs. At common law a married woman and her husband were both personally liable on all contracts entered into by her before her marriage; and upon a judgment being obtained against her on such a contract, she was liable to be taken in execution under a ca. sa. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), does not in any way alter the legal liability of a married woman in respect of such contracts: per Lord Esher in *Scott* v. *Morley*. (1) The plaintiffs are, therefore, entitled to a judgment against the defendant personally. The advantage of such a judgment, as distinguished from a judgment against her separate estate, is that, in the event of her failing to satisfy the judgment, she may be proceeded against under s. 5 of the Debtors Act, 1869, and, upon proof that since the date of the judgment she has had means to pay, may be committed to prison. It was no doubt held in *Scott* v. *Morley* (2) that there is no power to commit a married woman to prison for default in satisfying a judgment upon a contract made by her after marriage; but the Court of

(1) 20 Q. B. D. at p. 125. (2) 20 Q. B. D. 120.

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Appeal expressly limited their decision to judgments which can be recovered against a married woman only by virtue of the Act of 1882, and negatived its application to judgments which could have been recovered against a married woman at common law before that Act. At any rate, the plaintiffs are entitled to judgment against the defendant's separate estate in the form given in *Scott* v. *Morley*. (1)

No counsel appeared on the other side.

WILLS, J. I think it is clear that the plaintiffs are entitled to judgment against the defendant personally. At common law the judgment would have gone against her personally. Has, then, the Act of 1882 altered the law in that respect? I think not. Had the plaintiffs been compelled to seek their remedy under s. 1, sub-s. 2, of that Act, as was the case in *Scott* v. *Morley* (1), they would no doubt have been confined to a judgment against the defendant's separate estate. But that is not the case here.

VAUGHAN WILLIAMS, J., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiff: *Kisch & Wake.*

(1) 20 Q. B. D. 120.

J. F. C.

[IN THE COURT OF APPEAL.]

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Lands Clauses Acts—Compensation—Determination of Amount of Compensation by Justices—Taking of part of Land subject to Lease—Interest less than a Year in Land taken, but greater than a Year in adjoining Lands—Injuriously affecting adjoining Lands—Jurisdiction of Justices to assess Compensation—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 68, 121.

By s. 121 of the Lands Clauses Consolidation Act, 1845, if lands comprised in a lease "shall be in the possession of any person having no greater interest therein than as a tenant for a year or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same. . . ."

A railway company, with compulsory powers for the purchase of land, gave to a lessee notice to treat in respect of a part of the land held by him under a thirty years' lease made in 1889, and determinable as to the whole or any part of the premises by the lessor by three months' notice. Subsequently the lessor gave the lessee a three months' notice to determine the tenancy of that part of the land which was comprised in the notice to treat, and during the currency of the three months' notice the company took possession of such part of the land under s. 85 of the Lands Clauses Consolidation Act, 1845. The compensation payable to the lessee was subsequently assessed by a metropolitan police magistrate upon a summons under s. 121:—

Held, that, assuming that the lessee was entitled to compensation for damage sustained by him during the residue of his term of thirty years in respect of the remainder of the land held by him, the magistrate had no jurisdiction, by virtue of s. 121, to assess such compensation, which could only be assessed by arbitration or a jury under s. 68 of the Act, and that he had only jurisdiction to assess compensation for the value of the lessee's interest in the land taken, and for damage sustained by him by severing or otherwise injuriously affecting the remainder of his land during the continuance of the term of three months for which the land taken was held.

Reg. v. *Kennedy* ([1893] 1 Q. B. 533) considered and explained.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

On October 21, 1892, a summons had been taken out by the

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appellants, before the metropolitan police magistrate at Woolwich, to hear and determine the amount of disputed compensation to be paid by them to the respondent under s. 121 of the Lands Clauses Act, 1845. On October 28, 1892, the summons came on for hearing, when the respondent contended that the magistrate had no jurisdiction on the ground that his interest in the lands held by him was greater than that of a tenant from year to year; the magistrate agreed with the contention, and declined jurisdiction. The appellants applied to the Queen's Bench Division for a mandamus to the magistrate to assess the compensation; and on February 8, 1893, Lord Coleridge, C.J., and Cave, J., held that the magistrate had jurisdiction, and made absolute the rule for a mandamus. The respondent did not appeal against this decision, which is reported as *Reg.* v. *Kennedy.* (1) The summons came on again for hearing before the learned magistrate, when the following facts were proved or admitted:—

By a lease dated February 5, 1889, the Crown had demised to the respondent certain lands and premises at Eltham, together with certain sporting rights thereover, for a term of thirty years from October 10, 1886; the lease contained a reservation, reserving to the Crown in certain events power, upon giving to the lessee or leaving for him on the demised premises three calendar months' previous notice in writing of the intention to do so, to determine the tenancy of the whole or any part of the demised premises.

The appellants, who were constructing a new railway, required for the purposes of the railway certain portions of the lands so demised to the respondent, consisting of a strip running through and bounded on each side by portions of the demised lands, and on May 14 and June 24, 1891, they served him with notices to treat in respect of the portions required.

On June 30, 1892, the Crown served upon the respondent a three months' notice to determine his tenancy of those portions of land in respect of which the notices to treat had been given. No notice had been given by the Crown to determine the respondent's tenancy of any other portion of the demised lands.

(1) [1893] 1 Q. B. 533.

On July 20, 1892, the appellants gave notice, under s. 85 of the Lands Clauses Act, 1845, and s. 36 of the Railways Clauses Act, 1845, requiring possession of the portions of land comprised in the notices to treat, and took possession of those portions.

On the part of the appellants, it was contended that in point of law the magistrate ought not to allow the respondent any compensation, except in respect of the value of the lands taken, and the damage by severing or otherwise injuriously affecting the adjoining lands during the continuance of the unexpired term for which the lands mentioned in the notices to treat were held; and it was agreed that in such case the amount of compensation should be 31*l.* 10*s.*

On the part of the respondent, it was contended that, in addition to the sum of 31*l.* 10*s.*, he ought, in point of law, to allow the respondent compensation for any loss or injury he might sustain for damage done to him during his tenancy of the remainder of the lands still held by him under the lease of February 5, 1889, by reason of severing or otherwise injuriously affecting the same.

The learned magistrate decided against the appellants' contention, and, being of opinion that the respondent's contention was correct, determined the total amount of compensation at 386*l.* 10*s.*, and made a formal order to that effect.

The question for the opinion of the Court was whether, as a matter of law, the learned magistrate ought to have allowed the respondent compensation only for the value of the lands taken, and for damage by severance to the remainder of the lands held under the lease of February 5, 1889, during his unexpired term or interest in those portions of the demised lands comprised in the notices to treat. It was agreed that, if necessary, the magistrate's formal order should be amended by reducing the amount of compensation from 386*l.* 10*s.* to 31*l.* 10*s.*

The Divisional Court (Mathew and Collins, JJ.) gave judgment for the appellants upon the ground that the question was practically concluded by the decision in *Reg.* v. *Kennedy* (1), the ratio decidendi in that case being that there was no real

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claim for injuriously affecting the adjoining lands of the respondent. The respondent appealed.

Crackanthorpe, Q.C. (*Forman, Ernest Spencer,* and *F. O. Robinson,* with him), for the respondent. (1) The question is not res judicata; all that was decided in *Reg.* v. *Kennedy* (2) was that the date of the notice to quit, and not that of the notice to treat, must be looked at when assessing compensation in respect of the respondent's interest; the decision gave the magistrate jurisdiction, but did not decide the principle upon which the compensation was to be assessed. Although in respect of the strip of land taken the respondent is only entitled to compensation for a two months' tenancy, he is entitled to compensation for injuriously affecting the adjoining land for the remainder of a thirty years' tenancy, allowance being made for the possible determination of the tenancy by a three months' notice from the lessor.

[LORD ESHER, M.R. In this case the question reserved for us is as to severance damage only, and not as to injuriously affecting the remaining lands.]

It was clearly intended to include the latter; it was one of the contentions before the magistrate, and the mandamus directs the magistrate to assess the compensation for damage done by severing the lands held, "or otherwise injuriously affecting them." *Holt* v. *Gas Light and Coke Co.* (3) is an authority for the proposition that the respondent is entitled to compensation for damage done to his whole term in the lands not taken, although the part taken was not held for so long a term.

[LORD ESHER, M.R. In that case it became impossible to use the land as a rifle range; the respondent can still use his land for shooting. Besides, that was really a case of severance damage only.]

It was put upon the ground that the land not taken was injuriously affected, and in the present case there is damage by

(1) The terms "respondent" and "appellants" in this report are used with reference to the position of the parties on the appeal from the magistrate, and not to their position in the Court of Appeal.

(2) [1893] 1 Q. B. 533.

(3) Law Rep. 7 Q. B. 728.

injuriously affecting the land retained by the respondent independently of severance: namely, in respect of the damage to the breeding-ground for pheasants, the employment of extra keepers during the construction of the railway, and general interference with the respondent's farming and sporting rights. If no land had been taken, the respondent would have been entitled to compensation for injuriously affecting his land during the execution of the works, and he cannot be in a worse position when part of his land has been taken.

[KAY, L.J. If your contention is right, the magistrate had no jurisdiction as to your claim for injuriously affecting an interest which was greater than a yearly tenancy, and you should have proceeded under s. 68.]

No; s. 121 is exclusive of s. 68, and compensation must be assessed once for all, not in separate proceedings: *Reg.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1) Where the magistrate once has jurisdiction, s. 121 is wide enough to include all possible compensation in respect of every kind of damage or loss which can be suffered: per Lush, J., in *Reg.* v. *Great Northern Ry. Co.* (2)

Farwell, Q.C. (*Edward Boyle,* with him), for the appellants. The decision in *Reg.* v. *Kennedy* (3) is conclusive: it shews that the Court held that the magistrate had jurisdiction, because the respondent could not formulate an intelligible legal claim in respect of injuriously affecting the land not taken; in other words, they held that he had no interest which was the subject of compensation beyond an interest for a year, for had there been such an interest proceedings must have been taken under s. 68. At the time when the compensation was assessed by the magistrate, he had no jurisdiction to determine the compensation for injuriously affecting lands held for more than a year, as the respondent's remaining lands were held, for damage for injuriously affecting land is incident to the estate taken, and cannot be for a longer period than the lessee's interest in the land actually taken.

[He was stopped by the Court.]

(1) 4 E. & B. 88. (2) 2 Q. B. D. 151.
(3) [1893] 1 Q. B. 533.

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LORD ESHER, M.R. (After stating the facts, his Lordship proceeded.) The ground of the application for a mandamus was that Colonel North's claim could only be in respect of a three months' tenancy, not merely as regards the land taken, but also as regards severance damage and the injuriously affecting his adjoining lands. He contended that he had a larger claim in respect of his adjoining lands, which were valuable as a shooting property, and that, in consequence of the company taking the strip, the lands on each side of it were injuriously affected for the whole of the residue of his term. That is his present contention; but when before the Divisional Court on the application for a mandamus his counsel were asked what right he had to compensation beyond the value of his interest in the strip taken and damage by severance by reason of taking it, they were unable to formulate any other claim, and the Court came to the conclusion that as a fact Colonel North had no colourable right to any compensation for injuriously affecting his remaining lands. As to the law, it depended upon whether the claimant had a colourable right to the compensation claimed; the question could not be tried out at that stage, and if he had a colourable right to recover compensation for injuriously affecting land in which his interest was greater than that of a tenant from year to year, a magistrate would have no jurisdiction under s. 121, but proceedings must be taken to assess the compensation under s. 68. The Divisional Court was of opinion that Colonel North had no such colourable right, and, therefore, the mandamus went to the magistrate to assess the compensation under s. 121.

In assessing the compensation, the learned magistrate seems to have doubted whether the decision of the Divisional Court as to the question of fact was right or wrong; and, therefore, he assessed the compensation for the value of the interest in the land taken and for severance damage, disregarding the claim for injuriously affecting the remaining land, and also made an alternative assessment in which the latter claim was included, and stated a case for the opinion of the Court as to which of the sums was right. The Divisional Court again gave judgment against Colonel North, who appeals here.

It seems to me that in this position of affairs Colonel North

cannot insist that he has a greater right to compensation than one which would fall under s. 121; he was before the magistrate under that section, and if he had a claim for injuriously affecting property in which his interest was greater than as a tenant from year to year, the magistrate had no jurisdiction over any part of his claim, for he could not try part under s. 121 and leave the rest to be adjudicated upon in proceedings under s. 68; the whole claim must be gone into once only under one section or the other. Being before the magistrate, it was not open to Colonel North to say that he was entitled to larger compensation than that over which, under s. 121, the magistrate had jurisdiction—that is to say, the smaller sum of 31*l.* 10*s.* It is said that this is hard upon him because he had endeavoured to get his compensation assessed under s. 68, and had failed. It is true that he had done so upon the application for the mandamus, but only then; and he could have taken the course of appealing against that decision. He did not do so, and it is now too late for him to say, as he really must contend, that the mandamus should nót have issued. If, therefore, he had any further right to compensation than that which the Divisional Court held to confer jurisdiction upon the magistrate under s. 121—as to which I express no opinion—he cannot maintain it now.

In the course of the argument counsel expressed a wish that the Court should give its opinion upon the question whether, if Colonel North was, when before the magistate, confined strictly to such a claim as would give jurisdiction under s. 121, he can now proceed before an arbitrator or a jury under s. 68. I am clearly of opinion that he cannot; he could not have split up his claim by going under s. 121 for part of his compensation, and reserving the rest of his claim for proceedings under s. 68. Whether Colonel North has such a claim I think it unnecessary to decide; in my opinion it is wiser not to do so. The matter, therefore, stands thus: The railway company have taken land in which Colonel North had a three months' tenancy; by so doing they have severed his land on each side of the line, in respect of which severance he is entitled to compensation, but only for a three months' interest; but he further says that the railway company have injuriously affected his remaining land for so much

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of the original term of thirty years as is still unexpired. That claim gives rise to this question: Can it be said that the taking a strip of land held for three months only would amount to injuriously affecting the remaining land for thirty years? No doubt by taking it there is an injurious affecting of the remaining land by the railway company for three months; but is not the injurious affecting after that date rather the result of the act of the landlord in determining the tenancy of the part taken than of the railway company in taking the land? By the agreement between the parties the landlord would seem to have had a right to injuriously affect the respondent. I desire, however, to express no opinion on that point, which is unnecessary for the decision of this case. The appeal must be dismissed.

KAY, L.J., read the following written judgment. Colonel North, the respondent, under a lease from the Crown dated February 5, 1889, was entitled to certain land for a term of thirty years. The lease contained power for the Crown to determine the tenancy as to all or any part of the land upon three months' notice. The land included a good deal of covert used by Colonel North for preserving pheasants. In May and June, 1891, the Bexley Heath Railway Company gave to Colonel North notices to treat for a strip of land running through this property for the purpose of making a railway which would be in a deep cutting. Part of this strip went through and divided some of the pheasant coverts. On June 30, 1892, before anything had been done under the notices to treat, the Crown gave notice to Colonel North to determine his lease as to the strip of land included in the notices to treat only. Then, on July 20, 1892, the railway company proceeded to take possession under s. 85 of the Lands Clauses Act, and gave security for the estimated value of the land. Next, they took proceedings to have the purchase-money and compensation assessed, and, treating Colonel North's interest as being for three months only by reason of the notice determining his tenancy as to the strip, they took proceedings before a magistrate under s. 121, which gives the magistrate jurisdiction only when the person's interest is as tenant for a year or from year to year. The position of Colonel North at that time was that he was

tenant of the lands adjoining on both sides for the residue of the term of thirty years, subject to the contingency of having that tenancy determined by a three months' notice.

Colonel North objected to the jurisdiction of the magistrate. He said, in effect, "I have three claims—(1.) the value of my interest in the land taken; (2.) damages for severance of the land on either side; (3.) the injuriously affecting the land on either side by the execution of the works or otherwise." Moreover, he contended, as I understand, that each of these three claims should be valued as at the date of the notice to treat, not the actual date of the valuation, and at the date of the notice to treat his interest in the land actually taken was for the residue of the term of thirty years, subject to the contingency of its being determined by a notice which had not then been given. The magistrate decided that he had no jurisdiction. Thereupon the company applied for a mandamus to the magistrate to assess the price of the land or other compensation. On February 8, 1893, the Divisional Court granted the mandamus. As I understand, they held, first, that the time to be regarded was the date when the magistrate had to make the assessment. The contingency of having the tenancy determined by three months' notice had then become, as to the strip taken, a certainty which it was impossible to disregard. The price, therefore, must be the price of a three months' tenancy of the strip, and the damage by severance must be damage for a three months' severance. The severance beyond the three months was not by the railway company but by the Crown, who by determining the tenancy resumed possession of the strip after the three months, and I suppose have sold their reversion in it to the railway company. There remained the third claim for injuriously affecting the adjoining land on either side of the strip which was held for more than one year or from year to year. The Divisional Court evidently doubted whether the magistrate had jurisdiction to assess the compensation for this; but they doubted still more whether there was any such injury, and they invited counsel to formulate their claim on this account. Counsel could not, or would not, or at all events did not, do this to the satisfaction of the Court; and therefore, on the ground that there was no tangible claim in this respect, the Court granted

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the mandamus. The effect of that was that the Divisional Court considered that the only valid claims were, first, for the price of the three months' tenancy of the land taken, and, secondly, for the severance for three months of the adjacent lands on either side; and they held that these two claims were within the jurisdiction of the magistrate.

The case went back to him, and he awarded 31*l.* 10*s.* for these two claims; but if he had jurisdiction to deal with the other claim for injuriously affecting otherwise than by severance he awarded 368*l.* 10*s.*, and he stated a special case as to which sum should be allowed for the opinion of a Divisional Court. That Court upon argument of the special case held that the matter had been decided upon the application for a mandamus, and that the larger sum therefore could not be given. This appeal is from that decision.

It seems quite clear that s. 121 applies only when the land taken and the adjoining land are all held for not more than a year or from year to year, and that the magistrate had no jurisdiction to assess the larger compensation in this case. In truth the proper course for Colonel North, if he insisted on this larger claim, was to have appealed the order for a mandamus in order to have had his claims assessed, not by a magistrate under s. 121, but by arbitration or by a jury in the ordinary way under s. 68. On this appeal we are bound to treat the mandamus as rightly granted. The only claims which the magistrate could deal with under it were those which he has valued at 31*l.* 10*s.* The decision of the Divisional Court must therefore be affirmed, and the appeal dismissed.

A. L. SMITH, L.J. The only question which we have to consider upon this appeal is whether the larger or the smaller sum should be awarded by the magistrate to Colonel North as compensation for the damage to his interest by the execution of this railway. The facts have been detailed by the Master of the Rolls and my brother Kay, and I will only draw attention to one or two dates for the purpose of emphasizing the point upon which I desire to give judgment. In May and June, 1891, the railway company had given Colonel North notices to treat for

two portions of certain property which he held under a lease from the Crown for thirty years, determinable at any time as to any part of it by a three months' notice to quit. One reason for this provision is obviously that in the event of a railway coming across the property the lessor might have his lands in hand, and get compensation upon that footing, and not merely in respect of a reversion falling in at the determination of a long lease. No proceedings were taken by either party on the notices to treat, though Colonel North could, I think, have proceeded to have his compensation assessed under s. 68. On June 30, 1892, the landlord—that is, the Crown—gave Colonel North notice to quit in respect of the strip of land comprised in the notices to treat; and on July 20, 1892, the company gave him notice under s. 85 of their intention to enter and occupy this land. In October, 1892, Colonel North was summoned by the company before the magistrate to have his compensation assessed. When the case came on, he contended that the magistrate had no jurisdiction, because, though it was true that his tenure of this particular strip was for less than a year, yet the effect of taking the strip was to injuriously affect the residue of his land, which was held upon a tenancy greater than for a year or from year to year. The magistrate declined jurisdiction; whereupon the railway company applied for a mandamus to compel him to proceed, which was heard before the Lord Chief Justice and Cave, J. Reading their judgment, it seems clear to me that the ratio decidendi was that the Court could not see that Colonel North had any real, tangible claim for injuriously affecting his remaining property, and that his only claim was in respect of the value of the strip taken, in respect of which he could only claim for an interest less than a year. This judgment was not appealed against, and the case went back to and was heard by the magistrate, who has stated this case, upon which the sole point for our consideration is whether Colonel North is entitled to have his compensation in respect of injuriously affecting the remaining land assessed by the magistrate upon the basis of a thirty years' tenancy of that property. My answer to that question is a short one: I say that it is manifest that if he is entitled to the larger sum found by the magistrate—that is, to

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damages for injuriously affecting his interest during the residue of the thirty years' lease—the magistrate had no jurisdiction whatever to assess it, for compensation in respect of such an interest could only have been assessed, if it existed in fact, under s. 68.

Appeal dismissed.

Solicitor for appellants: *George Whale.*

Solicitors for respondent: *Dollman & Pritchard.*

W. J. B.

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June 6, 23.

HYDARNES STEAMSHIP COMPANY *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY.

Insurance (Marine)—Policy—Clause partly in Print and partly in Writing—Attachment of Policy.

By a policy of marine insurance expressed to be on freight of meat "at and from Monte Video to any ports in the Rivers Plate (including the Boca) Parana or Uruguay, and thence to the United Kingdom," it was provided that the underwriters should "be liable for any loss occasioned by breaking down of machinery until final sailing of vessel," and that "the assurance shall commence upon the freight and goods from the loading of the said goods on board at Monte Video." The name "Monte Video" in the last-mentioned clause was in writing, the rest of the clause being in print. After arrival at Monte Video, where outward cargo was discharged, the ship proceeded up to the Boca, where, before she received any meat on board, her refrigerating machinery broke down to such an extent as to render it necessary to abandon the design of carrying meat. At the date of the policy it was known to both underwriters and assured that, although meat could be loaded at various ports in the above-named rivers, it could not be so loaded at Monte Video in consequence of the absence of appliances at that port:—

Held, that the words "at Monte Video" in the clause defining the commencement of the assurance were a compendious mode of enumerating the several loading ports in the rivers named, that the clause was therefore not to be rejected as insensible, and that as no meat was ever loaded on board the ship the policy never attached.

FURTHER consideration before Wills, J.

The action was brought to recover a sum of 2000*l.* under a policy of marine insurance on freight.

The policy so far as is material was in the following words "This policy witnesseth that in consideration of the sum of *17l. 10s.* the Indemnity Mutual Marine Assurance Company, Limited, doth agree that the said company will make good all

such losses hereinafter expressed as may happen to be the subject-matter of this policy, and may attach to this policy in respect of the sum of *2000l.* hereby assured, which assurance is hereby declared to be upon *freight of meat valued at 3000l. warranted free from all claims (except general average and salvage charges) unless caused by stranding sinking burning or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel,* the ship or vessel called the *Hydarnes (S.)* lost or not lost at and from *Monte Video to any ports or places in any order backwards and forwards in the River Plate (including the Boca)* $\frac{and}{or}$ *the River Parana* $\frac{and}{or}$ *Uruguay and thence to any port or ports of the United Kingdom* $\frac{and}{or}$ *continent of Europe not north of Hamburg that port included in any order, and thence to any port or ports in the United Kingdom in any order, with leave to call and wait at any port parts and places for all purposes (especially in any order in the Brazils either to discharge or take in cargo, or for any other purposes) with leave to tow and be towed and assist vessels in all situations. To return 2s. 4d. per cent. for no River Panana or Uruguay risk. . . . .* The assurance aforesaid shall commence upon the freight and goods or merchandize on board thereof from the loading of the said goods or merchandize on board the said ship or vessel at *Monte Video,* and shall continue until the said goods or merchandize be discharged and safely landed at *as aforesaid.* Dated the *23rd* day of *January, 1890.*" The words in italics were in writing, the rest of the policy being in print.

The freight insured arose under a contract of May 9, 1889, between the plaintiffs, brokers of the one part, and Sansinena & Co., merchants, of the other part. By clause 8 of that contract it was provided that "as soon as possible after the arrival of the steamer at Boca, Buenos Ayres, and after the discharge of cargo if any stowed in the refrigerating chambers, the refrigerating engine shall be worked until the temperature in the said chambers shall be reduced below 28° Fahr., and then and not till then the steamer's agents shall give written notice that the steamer is lying ready to receive the meat," and the lay days were—subject to exceptions—to commence twenty-four hours after the receipt of the notice by the agents of Sansinena & Co.

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Twelve working days were allowed to cover the time of both loading and unloading. By clause 13: "The charterers shall pay freight on the arrival of the steamer at the port of discharge of the meat intended for such port, and such freight shall be payable on all carcases which may be shipped at Boca Buenos Ayres for such port" at certain rates.

The vessel arrived at Monte Video on the outward voyage and there discharged outward cargo. She then proceeded to the Boca, where she arrived on January 25, 1890. The refrigerating engine was started on January 27, to cool down the brine which circulates in pipes through the chambers and thus reduces them to the required temperature. On February 8, the brine was once reduced as low as 27½°, and on February 11 to 27°; but this temperature was not maintained, and the temperature of the brine was generally above 28°, and none of the meat chambers had got below 33°. The stipulated degree of cold in the chambers, therefore, had not been reached. No notice was given to the charterer's agents under the 8th clause of the charterparty, and the vessel was not in fact ready to receive the meat. On February 11, the refrigerating engine broke down in a way and under circumstances which rendered repair in South America impossible, and the adventure, so far as the carriage of meat was concerned, was properly abandoned, and notice of abandonment was duly given to the defendants.

At the time this policy was entered into no meat ever was or could be loaded at Monte Video. There were no appliances for freezing meat at Monte Video. The Boca is a part of the port of Buenos Ayres. The Parana is the main affluent of the River Plate. The Uruguay falls into the waters of the Parana some thirty or forty miles above Buenos Ayres. There were appliances for freezing meat at the Boca, and at places higher up both on the Parana and the Uruguay, notably at San Nicolas on the Parana, and at Fray Bentos on the Uruguay. These facts were well known to shippers, shipowners, and underwriters, and were known to both plaintiffs and defendants when the policy was entered into.

Sir R. Webster, Q.C., and *Horridge* (*Bigham, Q.C.*, with them),

for the plaintiffs. The parties knew that no meat could be loaded at Monte Video, and necessarily contracted with reference to a cargo to be loaded elsewhere than at that port. But the policy is expressed to be on freight "at and from Monte Video." The only meaning therefore that can be given to the policy is that it was intended to attach before the loading of any meat, and to cover the risk of preparing the refrigerating chambers for the reception of the meat. The later clause, which says that the assurance shall commence from the loading of the meat, is in print, whereas the clause which describes the voyage is in writing, and in cases of conflict between written and printed clauses the former are to prevail, "inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects." Per Lord Ellenborough: *Robertson* v. *French.* (1) If, indeed, the printed clause is not to be rejected, the whole policy becomes insensible, for it being known to the parties that the loading of meat at Monte Video was impracticable, under no circumstances could the policy ever attach.

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. No meat having been loaded on board the ship the policy never attached. The later clause designating the commencement of the risk as being from the loading of the goods ought not to be rejected. That clause is not wholly in print, the words "Monte Video" are in writing, and were inserted for the express purpose of making the printed clause apply to the case. And the insertion of "Monte Video" alone, notwithstanding the parties knew that that port was not a practicable one for the loading of meat, does not make the clause unmeaning—for by the terms of the policy there was liberty to load at other ports in the rivers named, and "wherever it can fairly be deduced from the whole construction of the policy that the parties contemplated loading at any intermediate ports in the course of the voyage insured, the policy attaches not only on goods loaded on board at the port of departure, but also on those loaded on board at any of

(1) 4 East, 130, at p. 136.

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the ports where upon a true construction of the whole instrument it must be presumed that such a loading was contemplated': Arnould, Part I., chap. 9, 5th ed. p. 383. The reason why Monte Video was the only place inserted in the printed clause was probably because the blank space in the middle of the print was not large enough to allow of the insertion of more. The risk of breakdown of machinery before loading is a risk which would presumably be insured in an outward policy rather than in a homeward one. The risk of breakdown of machinery insured against in this policy must have referred to a breakdown after loading had begun.

Sir R. Webster, in reply.

Cur. adv. vult.

June 23. WILLS, J., read the following judgment. [After stating the facts as above set out, the learned judge proceeded as follows:—]

There is no doubt that the machinery spoken of in the policy is or includes the refrigerating machinery in question. There is no doubt that it broke down before the final sailing of the vessel, and (without going into details) there is no doubt that if the risk ever attached, the money assured by the policy is due; and the real, and indeed only, question is whether the assurance had commenced—a question which must be answered by a study of the policy itself. The words in the policy, "The assurance shall commence upon the freight and goods or merchandize on board thereof" (i.e. of the vessel) "from the loading of the said goods or merchandize at" are in print. The name "Monte Video" completing the sentence is in writing. Two things, therefore, appear to be pretty plain. First, an assurance upon freight and an assurance upon goods (if effected) were intended to commence simultaneously, and the event upon which either attached was the loading of goods—that is to say, an assurance upon the goods would commence with the loading of the goods insured, an assurance upon freight with the loading of the goods in respect of which the freight would accrue. Secondly, "Monte Video" was advisedly inserted. And yet a literal reading would reduce the clause to nonsense. Both parties knew that the freight insured

could not accrue in respect of any goods that could be put on board at Monte Video; and if so, and if no other interpretation is possible, either the whole assurance must go as an absurd and impossible contract, or this clause must be rejected as nonsense. The latter view is that contended for by Sir Richard Webster. The defendants say, on the other hand, that the words "at Monte Video" were intended to cover both Monte Video and any other loading port permitted by the policy, and that as no meat had been loaded at the Boca when the accident occurred the policy had never attached. It would certainly appear from the cases as to insurance upon goods that with a policy so expressed the phrase "at place A.," A. being the first place mentioned in the description of the voyage contained in the policy, is sufficient to cover the other unnamed loading ports; and as, in this policy, freight is clearly intended to stand upon the same footing as goods in respect to this clause, my opinion is that the policy should be so read, and I see no reason for not giving this construction, because the first place named in the description of the voyage is one at which this particular class of goods in question could not be loaded. "Monte Video" stands in such a collocation simply to indicate that from one end of the series of lawful loading places to the other the policy should attach from the loading of the goods. I do not lose sight of the fact that as a general rule the principles which regulate the commencement of risk as regards goods and freight are far from identical. But how can such general principles apply when the clause, and the only clause which is intended to deal with and define the commencement of risk, deals with freight in exactly the same words as apply to goods? The method of interpretation I have referred to, by which the mention of the first of the lawful loading ports in the clause defining the commencement of risk has been held to cover the whole series, though not named, and to make the risk attach at each of the lawful ports named in the description of the voyage, though not mentioned in the risk clause, is well established; and I can see no reason why, when the same words are made to deal simultaneously with freight as well as goods, the same principle of interpretation should not be adopted. This view is strengthened by a clause in the policy by

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which 2*s.* 4*d.* per cent. is to be returned if no River Parana or Uruguay risk be in fact incurred. The clause defining the commencement of risk appears to me, therefore, to make the policy attach to freight at each loading port as soon as the goods, in respect of which the assured freight will accrue, are put on board and not before, and the clause is intelligible enough. It remains to be seen whether such an interpretation is contradicted by any other part of the policy, or leads to results absurd in themselves, or so unreasonable that it is impossible to suppose that the parties can so have intended. The freight in the present case was payable, provided the vessel arrived at the port where the meat was to be discharged. The policy, therefore, from any point of view covered the loss of freight which would ensue if the vessel were lost by stranding, burning, collision, &c., after the meat was on board. But freight might be lost in another way. By the agreement between Sansinena & Co. and the plaintiffs the freight was payable on each carcase separately, and until the whole of the intended shipment was on board only so much freight would be in course of being earned as was applicable to the quantity actually shipped. If the machinery broke down during the loading of the meat, the freight would be only partially earned, though the ship came safely home. It would be partially earned because, so far as freight was concerned, it would not matter whether the meat were spoiled or not if the ship arrived, and the breaking down of the machinery, even though it included the destruction of the meat, would cause no loss of freight on the carcases already shipped. On those remaining to be shipped, if it prevented their being shipped, there would be a loss of freight. That the freight was not dependent upon the efficiency of the machinery after the homeward voyage began is obvious from the terms of the policy, and must have been known to the defendants when the insurance was effected. It was equally obvious that the plaintiffs sought to insure against the breaking down of machinery after the loading began. There is therefore, construing the policy as I have done, a risk to be insured against, and, as twelve days are allowed for loading and unloading, at least half that time might very well be occupied in loading; so that there is a

substantial risk in respect of breakdown of machinery undertaken by the underwriters. It is argued for the plaintiffs that it is so small a matter that the parties must have contemplated something beyond it, viz., the danger of loss of freight by reason of a breakdown before the ship was ready to receive the meat, or before the loading began. I do not see that I have any materials for measuring the value of the risk, nor do I think it would be consistent with sound principles of interpretation to enter upon so vague an inquiry. A policy of insurance can hardly receive one construction if the premium be 10*s.* per cent. and another if it be 15*s.* per cent. It is enough, as it seems to me, if there is, according to the construction adopted, a substantial risk of loss of freight by reason of breakdown of machinery after the loading has begun, and the assurance has therefore attached. The difficulty—I should rather say the impossibility—of adopting the view presented on behalf of the plaintiffs seems to me to be in the fact that it requires that the clause defining the commencement of the risk should be altogether rejected. So strong an expedient should not, as it seems to me, be resorted to unless it is not reasonably possible to adopt a construction by which every part of the contract shall have its meaning. Perhaps no clause can be more important than that which defines the commencement of the risk. That it was intended to be more than formal and to have a real application is apparent from its being completed in writing, while other blanks in places not applicable to the insurance of freight are left unfilled. It points most clearly to loading of some sort as preliminary to the attachment of risk. The contention of the plaintiffs would expunge it altogether. I cannot think this can be right. The risk of breakdown insured against continues until final sailing of vessel. This provision, however, does not seem to me to affect the present question. A breakdown, however disastrous to the meat between the completed loading and the final sailing, would not affect the right to freight, and I think the expression merely meant that so long as there was a port to be called at where freight on meat could be earned, the insurance against the loss of freight by breakdown of machinery should be in force. In fact, it amounts only to an additional illustration of the necessity of reading "at

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Monte Video" in the clause defining the commencement of risk as equivalent to "at and from Monte Video." Sir Richard Webster argued that it was abundantly evident that the underwriters meant to take the risk of what I may call preliminary breakdown. If I were at liberty to interpret the contract by the correspondence which took place when the breakdown was announced I should be of the same opinion. It is clear that the real objection then entertained by the defendants was, that they thought the adventure had not been properly abandoned. But it does not need authority, though there is abundance of it, to shew that a contract must be construed by its own language, and not by any views taken of the meaning of that language by the parties. I have not forgotten that there is strong authority for the general proposition that insurance on freight attaches when the ship is at her port of loading with cargo ready for her or contracted for, and herself ready to receive the cargo, and in many instances still earlier. But, as I have already pointed out, these general principles seem to me inapplicable in face of a specific and inconsistent provision as to the time when risk shall attach, and, as I have said, the ship was not, in fact, ready to receive the meat. The real question appears to me to be whether the clause as to the commencement of the risk is to be expunged as insensible and unintelligible, or whether it is possible to give to it a meaning that is not contradicted by any other part of the policy. For the reasons I have given, I am of opinion that my judgment must be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Pritchard, Englefield, & Co., for Simpson, North, & Co., Liverpool.*

Solicitors for defendants: *Waltons, Johnson, Bubb, & Whatton.*

J. F. C.

[IN THE COURT OF APPEAL.]

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CHAPMAN *v.* FYLDE WATERWORKS COMPANY.

Waterworks—Negligence—Apparatus out of Repair—Water Company, Power of, to do Works in a Street—Special Act—"Works necessary for supplying Water"—Stop-cock in Service-pipe—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 28, 48, 51, 52—*Waterworks Clauses Act,* 1863 (26 & 27 *Vict. c.* 93), *ss.* 17, 19.

A water company under the provisions of their special Act, which incorporated the Waterworks Clauses Acts, 1847 and 1863, had power to lay down, repair, and maintain (inter alia) pipes and all other works necessary for supplying water within the limits of their Act.

At the request and expense of the owner of a house the company laid down a service pipe leading from their main under the street into the house, in which they placed a stop-cock for the purpose of regulating tne supply of water. This stop-cock was protected by a cover or guard-box let into the pavement, which was provided with a lid or flap. Owing to the hinge of the lid or flap being out of repair, it projected above the pavement, and the plaintiff while passing along the street tripped over it and sustained injury. The apparatus could not be repaired without being removed, or removed without breaking up the pavement. The jury found that there was negligence on the part of those who were liable for the repair of the hinge:—

Held, without deciding the question whether the apparatus belonged to the company or to the owner of the house, that the company, who alone had power to break up the street for the purpose of repairing the guard-box, were responsible for its repair, and therefore liable in respect of the injuries sustained by the plaintiff.

APPEAL from the judgment of Day, J., at the trial with a jury.

The action was in respect of personal injuries alleged to have been occasioned to the plaintiff by the defendants' neglecting to keep in repair a cover or guard-box protecting a stop-cock in a service or communication pipe between their main and the premises of a consumer.

The facts, so far as material, appeared to be as follows. The defendants were a water company constituted by a special Act (24 & 25 Vict. c. cliv.). The company's Acts incorporated the Waterworks Clauses Acts, 1847 and 1863, save so far as expressly varied or excepted. By s. 21 of the before-mentioned special Act it was enacted that: "The works, which the company are by this Act authorized to execute, comprise the following water-

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works with all requisite works and conveniences connected therewith .... eighthly, the laying down, repairing, and maintaining of all embankments, drains, sluices, cuts, channels, pipes, wells, and all other works necessary for supplying water within the limits of this Act." The rules and regulations issued by the defendants provided as follows. 1. The branch or service-pipes from the main in the street into the premises to be supplied will be provided and laid by the company at the expense of the owner or occupier on receiving the company's form of order filled up and signed by the owner or his agent. 2. The company on application at one of their offices are prepared at reasonable charges to lay and fix pipes and fittings in the interior of houses, or, if parties prefer, they can employ their own plumbers, but such plumbers are to be admitted by the company as authorized waterworks plumbers. 3. The company will prescribe the bore, size, dimensions, weight, strength, and other particulars of all pipes, valves, cocks, cisterns, and other apparatus through or by which a supply of water is to be given, and no other than those prescribed shall be used. 5. No authorized plumber shall make any alteration or repairs or connect any pipe so as to take any of the company's water, until due notice has been given at the company's offices, and such alterations, repairs, and work shall be done under the instructions and to the satisfaction of the proper officer of the company. 8. All interior service-pipes shall be kept in constant repair by the owner or occupier so that no water be wasted.

The defendants had, on an order signed by the owner of a house in a street in Blackpool within their district, requesting that they would supply water to his house and provide and cause to be laid the necessary communication pipes, taps, and other fittings, provided and laid a service-pipe under the street between their main and the house, at the expense of the owner. In this service-pipe a stop-cock was placed by the company by which the supply of water through the service-pipe could be regulated. This stop-cock was protected by a cover or guard-box let into the pavement, which was provided with a lid or flap so constructed as when closed to be flush with the pavement. The stop-cock could be worked by hand, but was at a distance

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of two feet and a half from the surface of the pavement, and to the hinge of the lid or flap being out of repair, it projected slightly above the pavement when closed, and the plaintiff in passing along the street tripped over it, and thereby sustained the injuries in respect of which the action was brought. It appeared that the apparatus could not be repaired without being removed, and that in order to remove it part of the pavement must be taken up. The jury found that the hinge was out of repair, and that there was negligence on the part of those responsible for the repair of it. They assessed the damages at 40*l.* The learned judge on these findings gave judgment for the plaintiff for the damages found by the jury.

Shiress Will, Q.C., and *R. W. Harper*, for the defendants. The service-pipe and apparatus connected therewith belonged to the owner of the house, and it was his duty to keep them in repair, not the defendants'. It is true that the company laid them down, but it was at the expense and upon the request of the householder. The stop-cock is inserted for the benefit of the consumer, being for the prevention of waste of water, for which, under the Acts, the consumer would be responsible, and of damage within his premises in the event of leakage. By the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 44, express provision is made that the service-pipe shall be laid down and repaired by the undertakers in the case of houses below a certain value. This rebuts any implication that they are bound to lay it down in the case of other houses. At the utmost they are only empowered to lay such pipes and maintain them in other cases, and there is no obligation on them to do so. By s. 48 owners or occupiers of houses have power to lay service-pipes on giving the company notice, and by s. 51 they may remove them, also on giving notice to the company, and by s. 52 they have power to break up the pavement "for any such purpose as aforesaid." By the group of sections commencing with s. 54, provision is made for preventing waste or misuse of water supplied by the company by imposing penalties on the consumer. By s. 55 the consumer is liable to a penalty for suffering any cistern, pipe, ball or stop-cock to be out of repair

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so as to cause waste of water. This imports by necessary implication that the consumer has power to repair. By the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 17, it is provided that, if any person supplied with water by the undertakers wilfully or negligently causes or suffers any pipe, valve, cock, cistern, bath, soil-pan, water-closet, or other apparatus or receptacle to be out of repair, or to be so used or contrived as that the water supplied is, or is likely to be, wasted, misused, unduly consumed, or contaminated, he shall be liable to a penalty. These enactments shew, it is submitted, that it is the duty of the consumer to keep the service-pipe and apparatus connected therewith in repair, and that he would have power to break up the street in order to do so. The powers of maintenance and repair given by s. 21 of the special Act and s. 28 of the Waterworks Clauses Act, 1847, are general powers. If, by the specific provisions relating to consumers, the duty is thrown on them of maintaining and repairing the service-pipes and apparatus connected therewith, it must be taken that so far the general powers of the company are not applicable. The fact that, under the regulations, service-pipes may be laid and repaired by the company is immaterial, for such an arrangement is merely for the convenience of the consumer, and in such case the company act as the consumer's agent. [They cited *Milnes* v. *Mayor, &c. of Huddersfield* (1); *Glover* v. *East London Waterworks Co.* (2)]

C. A. Russell, for the plaintiff. The general and special Acts have clearly given power to the company to lay down these service-pipes and, when so laid down, only the company have power to repair them. It follows that, when they exercised this power and laid down this apparatus in a street, a duty was imposed upon them towards the public not to be guilty of negligence in respect of keeping the apparatus which they had laid down in repair, so as not to be dangerous to persons using the street. It was held by this Court in *East London Waterworks Co.* v. *Vestry of St. Matthew, Bethnal Green* (3) that the power given by s. 28 of the Waterworks Clauses Act, 1847, to the

(1) 12 Q. B. D. 443; 11 App. Cas. 511.

(2) 16 W. R. 310.

(3) 17 Q. B. D. 475.

company included power to lay down and maintain an apparatus such as that in question, and for that purpose to break up a street. The consumer has no power to repair it, for he cannot break up the street, and the nature of the apparatus is such that it cannot be repaired without doing so. The power given by s. 52 of the Act of 1847 to the consumer to break up the street is confined to the previously mentioned purposes, viz. laying down or removing service-pipes. Sect. 19 of the Waterworks Clauses Act, 1863, expressly forbids any alteration of the service-pipe by the consumer without the consent of the company. The stop-cock is not put in for the benefit of the consumer, but primarily for the benefit of the company to regulate the supply of water. The position in which it is placed, two feet six inches below the pavement, shews that it was not intended to be meddled with by the consumer. The provisions which have been cited, imposing a penalty on the consumer in respect of waste of water through non-repair of any pipe or other apparatus, refer to internal fittings within the premises, not to any apparatus outside in the street. The regulations of the company shew that only internal fittings are to be provided and kept in repair by the consumer. It is immaterial whether the apparatus was the property of the consumer or the company. The question is, who had the control of it and power to repair it? It is submitted that an action could not possibly lie against the householder, who had no power to repair the pipe. Somebody must be responsible towards the public for keeping an apparatus like this in a public street in repair.

Shiress Will, Q.C., in reply.

LORD ESHER, M.R. I think the judgment of the learned judge was right. In my opinion, the fact that the apparatus in question formed part of the surface of a street, which would be used by the public, imposed upon the person who had the control of it a duty to keep it in repair, so as not to endanger the safety of the public. It is not necessary, as it seems to me, to determine whether the service-pipe and fittings connected with it were the property of the householder or not. I will assume that the service-pipe, and the stop-cock in it, and the

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cover or guard by which it was protected, were all of them the property of the householder. The question seems to me to be, who had the control of the apparatus so far as repairs were concerned? Sect. 21 of the special Act says that "the works, which the company are by this Act authorized to execute, comprise the following waterworks with all requisite works and conveniences connected therewith," and among the works enumerated are, "eighthly, the laying down, repairing, and maintaining of all embankments, drains, sluices, cuts, channels, pipes, wells, and other works necessary for supplying water within the limits of this Act." The case of *East London Waterworks Co.* v. *St. Matthew, Bethnal Green* (1) shews what is the meaning in an Act of this nature of the words "works necessary for supplying water," and that they include works necessary for preventing waste of water. By s. 28 of the general Act, the Waterworks Clauses Act, 1847, it is enacted under the heading "with respect to the breaking up of streets for the purpose of laying pipes," that the undertakers may, under such superintendence as thereinafter specified, open and break up the soil and pavement of streets and lay down pipes, service pipes, and other works and engines, and from time to time repair, alter, or remove the same, and do all other acts which the undertakers shall deem necessary for supplying water to the inhabitants of the district. Therefore the special Act has authorized the company to lay down such an apparatus as this and to repair it, and the general Act, for the purpose of so doing, has authorized them to break up the streets. But, by s. 31, the undertakers are only authorized to do so under the superintendence of the authority having the control of the streets. The question is, when the service-pipe and apparatus connected therewith have been laid down, whether by the householder or the company, and the work has been completed by making the street good, who has any power to interfere with the public street for the purpose of doing anything to them afterwards? The mere fact of a person having property laid down under the street does not authorize him to interfere with the street. Assuming the apparatus to be the property of the householder, he has no power to break up the street, unless an Act of

(1) 17 Q. B. D. 475.

Parliament has given him that power. The 52nd section of the Waterworks Clauses Act, 1847, gives him power to break up the pavement of a street in order to lay down a service-pipe to communicate with the pipes of the undertakers, and in order to remove the same. But he appears not to have power to break up the street for any other purpose. In this case the householder does not want to lay down a service-pipe or to remove one. On the contrary, he wants the pipe to remain where it is. He has therefore no power to break up the street, and consequently he cannot repair the apparatus. If so, it is idle to say that, because he has not done what he had no power to do, any person injured in consequence of its not being done can have an action against him.

On the other hand, under these Acts the company has power to repair the apparatus and to break up the street for that purpose. In my opinion, this stop-cock is put into the pipe for the benefit of the company, though of course there may be a subsidiary benefit to the householder through its use by them. At the most, it is put in for the joint benefit of the company and the householder. Therefore this apparatus is placed in the public street, at any rate, partly for the benefit of the company, and the company alone have power to keep it in repair. Under these circumstances, in my opinion, a duty to the public is imposed upon the company to keep it in proper repair so as not to be dangerous to the public. For these reasons I think that this appeal must be dismissed.

KAY, L.J. The plaintiff in this case tripped against the lid of a guard placed over a stop-cock in a service-pipe, leading from the defendants' main to a private house, and in consequence sustained injuries. It was proved that the hinge of this lid was out of repair, and consequently it did not shut down close, but protruded to some extent, which was the cause of the accident. It appears that the apparatus could not be repaired without removing it, and that its construction is such that it could not be removed without breaking up the surface of the street; when, as is usual, the top of it is fixed in a mould cut out of the paving-stone to receive it, it is obvious that it is impossible to remove

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it without taking up the paving-stone. The water-company, who are sued by the plaintiff, on the requisition of the householder themselves laid down the service-pipe; and of their own accord they placed this stop-cock in it, which is turned by hand, but is at a distance of two feet six inches from the surface of the street, and protected it with a guard as described. I will not refer to the Acts of Parliament upon which the case turns at length. It is enough to say that by the special Act the company had power to lay down such a service-pipe as this and to repair it, and by the 28th section of the general Act of 1847 they have express power to take up the street for the purpose of laying and repairing pipes, and of doing all other acts which they may deem necessary for the purpose of supplying water to the inhabitants of the district. It was upon that very section and the words of it which I have last read that it was decided in the case of *East London Waterworks* v. *St. Matthew, Bethnal Green* (1) that the company had power to place a guard like this over a stop-cock in the street. I have looked through the Act of 1847, and I cannot find anywhere in it an express power given to the owner or occupier of a house to repair a service-pipe, or to break up the surface of the street for the purpose of such repair. There are, I agree, powers commencing with s. 48, for the owners or occupiers of dwelling-houses to lay down service-pipes, and to remove the same, and by s. 52, for these two purposes, but, so far as I can see, only for these, power is given to them to break up the street. So on the special Act and the general Act of 1847, the only persons who have power to repair this apparatus and to break up the street for the purpose appear to be the company. Then we were referred to the later Waterworks Clauses Act of 1863. By s. 17 of that Act it is provided that, if any person supplied with water by the undertakers wilfully or negligently causes or suffers any pipe, valve, cock, cistern, bath, soil-pan, water-closet, or other apparatus or receptacle to be out of repair or to be so used or contrived as that water supplied to him by the undertakers is wasted, misused, unduly consumed, or contaminated, he shall be liable to a penalty. It cannot be denied that most of the things there mentioned are things which will be in the premises of the

(1) 17 Q. B. D. 475.

householder, and, judging from the collocation of the words, "cistern, bath, soil-pan, and water-closet" it would seem that the section refers to pipes, valves, or cocks on such premises, not pipes, valves, or cocks in the public street, to repair which it would be necessary to break up the street. Otherwise this absurdity would follow, that, though the occupier has no power under the special Act or general Act to break up the public street to repair them, under s. 17 he would be liable to a penalty for not doing so. It is plain to my mind that this section does not refer to a pipe or guard such as this in the public street, which the occupier has no power to repair, because he has no power to break up the street for that purpose. Another section which it is material to notice is s. 19 of the Act of 1863, which forbids the occupier under a penalty to make any alteration in any communication or service-pipe or in any apparatus connected therewith without the consent of the undertakers. Here, therefore, is a plain provision that the occupier shall have no power to alter an apparatus such as this connected with a service-pipe without the consent of the company. The meaning of the legislation taken together seems to me to be that it is not everybody who is to be allowed to break up the street and alter or interfere with the service-pipes and apparatus connected therewith, but only the company; if the occupier could break up the street, he could not alter the apparatus without the consent of the company; and if he had the consent of the company to the alteration, he could not break up the street. So, if an action were brought against the occupier of the house, his answer would be that he could not interfere with the apparatus without the consent of the company, and, even if he got the consent of the company, he could not break up the street, and therefore it was idle to sue him. Somebody must be liable for negligence in not repairing the apparatus. It must be the body who have by the Act power to repair and power to break up the street for that purpose.

A. L. SMITH, L.J. This is an action by the plaintiff to recover compensation for personal injuries sustained by her while passing along a street in Blackpool, through tripping over a lid laid over a stop-cock, which was out of repair, and which the jury found to

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have been negligently left out of repair. The question arises, who is responsible for keeping this lid in repair? I cannot doubt on looking at the enactments to which we have been referred that the liability to repair the apparatus rests on the company. It appears to me that by s. 28 of the general Act of 1847, a liability to repair, and by s. 21 of the special Act a liability to maintain and repair, is imposed upon them. The point was taken that no such liability was imposed, because the words used in the enactments were permissive not imperative. I do not think that contention can be maintained. Assuming that the Act does not impose any obligation on the company to lay down this apparatus, when the Act says that the company may lay it down and repair it, the meaning is that, if they do lay it down in the street, they must use due care in laying it down and keeping it in repair so that the safety of the public is not endangered. In my opinion it is clear that by the enactments in question the liability to repair this lid lay upon the company.

The point was taken that, because of the express obligation imposed on the company to repair service-pipes in the case of houses of a value not exceeding 10*l.* by s. 44 of the Act of 1847, it followed by implication that there was no such obligation in other cases. I do not think that this is an answer to the contention that, if the company do lay down such an apparatus in the street, a duty is imposed upon them to keep it in repair so as not to be dangerous to the public. Then it was urged that the pipe and stop-cock belonged to the occupier, having been laid down by the company at his expense. It is true that they were so laid down; but that does not do away with the obligation of the company to repair them. It was next argued on behalf of the company that the householder was bound to repair, but I cannot make out that under the statutes that is so. The sections which were pressed upon us as shewing this are the group of sections in the Act of 1847 beginning with s. 54, and that beginning with s. 16 in the Act of 1863, but these are all sections which apply to repairs for the purpose of preventing waste of water by the occupier. They have no application to an apparatus like this laid down in the public street. It is not

necessary, however, to decide whether the occupier is liable to repair, for, if the company are also liable, it is sufficient to support this action. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Woodcock, Ryland, & Parker, for J. W. Markland, Manchester.*

Solicitors for defendants: *Arkcoll, Cockell, & Chadwicke, for W. J. Dickson, Kirkham.*

E. L.

[IN THE COURT OF APPEAL.]

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June 11; *July* 9.

ART UNION OF LONDON, APPELLANTS; OVERSEERS OF THE SAVOY, RESPONDENTS.

Poor-rate—Exemption—Society instituted for purposes of the Fine Arts exclusively—"Voluntary Contributions"—6 & 7 Vict. c. 36, s. 1.

A society called the Art Union of London was incorporated by charter in 1846 for the advancement of the fine arts. The society's funds were derived from annual subscriptions. Membership was confined to subscribers, and might at any time be determined by failure to continue the annual subscription. Each subscriber of a guinea for the year received an engraving of a picture, and had a chance of winning a prize of a certain amount in an annual lottery. The amount of the prizes so won was expended in the purchase of works of art selected by the winners respectively, which the society purchased from the artist and paid for; and such works of art were exhibited before being given to the winners at an annual exhibition of the society, to which all the members had access. No dividend, gift, division, or bonus, in money, was made unto or between any of the members of the society:—

Held (by Lord Esher, M.R., and Kay, L.J., A. L. Smith, L.J., dissenting, reversing the judgment of a Divisional Court), that the society was entitled to exemption from rateability under 6 & 7 Vict. c. 36, s. 1, as being a society instituted for purposes of the fine arts exclusively, and supported by annual voluntary contributions, the word "voluntary" as used in the Act meaning "not compulsory."

By A. L. Smith, L.J.: Although the society was instituted for purposes of the fine arts exclusively, it was not supported by voluntary contributions. The term "voluntary," as used in the Act, does not signify merely "not compulsory"; and payments made with the object of procuring material advantages for the makers of them are not "voluntary contributions" within the meaning of the Act.

APPEAL from the judgment of a Divisional Court (Wright and Collins, JJ.) upon a special case stated under 12 & 13 Vict. c. 45,

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on an appeal against poor and other rates made upon the appellants in respect of premises occupied by them within the precincts of the Savoy, in the county of London. The question raised by the case was whether the appellants were exempted from liability to be rated in respect of such premises by 6 & 7 Vict. c. 36, s. 1, which exempts from rating premises occupied by "any society instituted for purposes of science, literature, or the fine arts exclusively, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money, unto or between any of its members."

The facts stated in the case as to the constitution of the society were in substance as follows. The appellants' society was incorporated by a charter granted December 1, 1846, which recited that they were a society formed for the general advancement of the fine arts, and for promoting and facilitating a greater knowledge and love of the arts of design on the part of the public generally, and that they had raised for the purposes aforesaid sums of money amounting to about 100,000*l.* by subscriptions or contributions, to be allotted or distributed by chance as prizes amongst them, on condition, nevertheless, that such sums of money so allotted or distributed should be expended solely and entirely in the purchase of paintings, drawings, sculpture, and other works of art, and that they had also purchased paintings and other works of art to be afterwards allotted by chance among them. Under the charter the property and management of the society were vested in a council of members, consisting of a president, vice-president, secretaries, and certain elective members, who were empowered to make by-laws for the regulation of the society. General meetings of the members for, among other purposes, the distribution of prizes, as after-mentioned, were provided for; and the charter contained a declaration that all works of art selected or given as prizes in each year should be exhibited in some convenient place in the metropolis, and that the members of the society should have free access to the same under such regulations as should from time to time be made. By the society's by-laws the object of the society was stated to be the general advancement of the fine arts, and the promotion of a

greater knowledge and love of the arts of design on the part of the public generally, and to give encouragement to artists beyond that afforded by the patronage of individuals, and to carry out such public encouragement of the fine arts in good faith according to the provisions of 9 & 10 Vict. c. 48, intituled "An Act for legalizing Art Unions," and not to advance private or individual trading, gain, or profit. One of the by-laws provided that the society should not make any dividend, gift, division, or bonus in money unto or between any of its members; and it was stated that in point of fact no dividend, gift, division, or bonus in money unto or between the members ever was made. Membership of the society was confined to subscribers. Subscribers of one guinea or upwards became members for the year for which the subscription was paid, and subscriptions might be paid in advance. Membership could at any time be determined by failure to continue the subscription. The by-laws provided for the formation of a reserve fund out of the annual subscriptions for the purpose of purchasing or building a gallery and carrying out the objects of the society; and out of such reserve fund premises had been acquired and a gallery built, and a stock of works of art purchased. The accumulations of such reserve fund were entirely represented by the society's premises and stock of works of art. It was further provided by the by-laws that the subscriptions for each year, after paying rent, taxes, salaries, and other necessary expenses of the year, and after providing for the reserve fund, should be devoted to the purchase of pictures, drawings, enamels, sculpture, medals, engravings, or other works of art, and they were in fact so applied. The works of art so purchased included every year one work of art (called the "annual work of art"), engravings or copies whereof were procured by the society to be made or executed. Every member who subscribed one guinea received, in the year for which the subscription was paid, one engraving or copy of the annual work of art for the year, or a large bronze medal, and also had one chance of obtaining one of the prizes distributed in that year, as after mentioned. Any member having paid his subscription for the current year might have any number of extra chances in the allotments or distribution of

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prizes at half-a-guinea each. A subscription of ten years in advance entitled the subscriber to a porcelain bust, or other work of art, as a bonus; and any member who had subscribed ten guineas in successive years ending with the current year, without gaining a prize of any kind in that period, was entitled to one of the society's porcelain busts or other work of art as a consolation prize. Prizes varying in amount from 100*l.* to lesser sums were awarded by lot at an annual distribution, held usually in April, the number and value of such prizes being determined by the council. The amount of the prize could only be used in purchasing some work of art selected from certain named art exhibitions, such as the Royal Academy. The holder of a prize might choose one work of art only, which might be of greater value than the prize provided, in which case the prize-holder paid the balance; but, if a work of less value than the prize were selected, the surplus went to the reserve fund of the society. The amount of the prize or of the price of the work selected (whichever was the less) was paid by the council direct to the artist, and no payment was ever made to, or permitted to come into the hands of, the prize-holder. Every work of art so selected was delivered direct to the society for exhibition, and did not become the property of the prize-holder until after such exhibition. If the prize-holder sold, or attempted to sell, his right of selection, the amount of the prize was forfeited and merged in the reserve fund of the society. The prizes for each year, and the annual work of art for such year, and some of the engravings or copies thereof, were exhibited in the same year, generally in the month of August, in the gallery of the society. The exhibition also included other works of art from time to time in the society's possession. This exhibition was kept open for two or three weeks, and the members and their friends had free admission thereto. No newspapers were taken or refreshments provided on the society's premises for the subscribers. The property of the society consisted of their premises, acquired as aforesaid, and the furniture and fittings thereon, and a large collection of engravings, statuettes, busts, and medals, together with original pictures, statuary, bronzes, and other works of art, and also included a small reference library, for the use of

members, of books connected with the fine arts. The whole of their property had been derived from the subscriptions of members, and they had no income other than from current subscriptions. The society had obtained a certificate from the barrister for the time being appointed to certify the rules of friendly societies in England pursuant to 6 & 7 Vict. c. 36, that the society was entitled to the benefit of the Act.

The Divisional Court gave judgment in favour of the respondents, holding that the appellants were not entitled to exemption from rating.

June 11. *Smyly, Q.C.*, and *L. S. Bristowe, McCall, Q.C.*, with them, for the appellants. The appellants' society comes within the exemption given by 6 & 7 Vict. c. 36, s. 1, as being a society instituted for purposes of the fine arts exclusively, and supported by annual voluntary contributions. The fact that engravings and prizes are given to the members does not prevent the society from being for the purposes of the fine arts exclusively, for the matters so distributed are calculated to spread a taste for the fine arts. Also, the society is supported by voluntary contributions, because the members subscribe voluntarily, and there is no legal obligation upon them to continue subscribing. There is no gift or bonus in money given to members. The Act only forbids a dividend, gift, division, or bonus, in money. [They cited *Churchwardens of Birmingham* v. *Shaw* (1); *Russell Institution* v. *St. Giles* (2); *Churchwardens of St. Anne, Westminster* v. *Linnæan Society* (3); *Liverpool Library* v. *Mayor of Liverpool* (4); *Reg.* v. *Gaskell* (5); *Marylebone* v. *Zoological Society*. (6)]

Poland, Q.C., and *Ryde*, for the respondents. This is not a society instituted for purposes of the fine arts exclusively within the meaning of the exemption. It is an association of persons for the purpose of procuring for themselves objects of art which they desire to possess. The Act contemplates a society the object of which is to promote science, literature, or the fine arts, from a disinterested point of view. The society is not supported

(1) 10 Q. B. 868.
(2) 3 E. & B. 416.
(3) 3 E. & B. 793.
(4) 5 H. & N. 526.
(5) 16 Q. B. 472.
(6) 3 E. & B. 807.

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by voluntary contributions. The word "voluntary" in the statute does not mean the opposite of compulsory, but is used in the same sense as in the expression "voluntary conveyance." It means something in the nature of a donation, not a payment for a valuable consideration. The subscriber in this case really buys a right to receive an engraving of the annual work of art and a chance in a lottery. If the subscriber gets something of value beyond an intellectual advantage, scientific, literary, or artistic, as the case may be, the society is not within the exemption. [They cited *Reg.* v. *Institution of Civil Engineers* (1); *Reg.* v. *Brandt* (2); *Commissioners of Inland Revenue* v. *Forrest* (3); *In re The New University Club.* (4)]

Smyly, Q.C., in reply.

Cur. adv. vult.

July 9. LORD ESHER, M.R. In this case the question raised is whether the premises occupied by the appellants are or are not rateable. The answer to that question depends upon the question whether or not the appellants are a society instituted for the purpose of the advancement of the fine arts within the meaning of the statute 6 & 7 Vict. c. 36, s. 1. The authorities have established that a certificate given under that statute by the barrister is not conclusive on that question. We must therefore consider the question. The original object of this society certainly seems to have been the promotion of the fine arts; but the question is whether, having regard to the mode in which they have exercised their functions, they have ceased to be an association solely for the promotion of the fine arts within the meaning of the Act. The practice of the society substantially appears to be this. So far as their means will allow, they select what those who have the management of the society consider to be the finest picture of the year and purchase it. They do not purchase it to sell again; they exhibit it, and have it engraved; and they give a copy of the engraving to each of their subscribers. They also allow subscribers selected by lot to select for themselves works of art up to a certain value, and they buy

(1) 5 Q. B. D. 48.
(2) 16 Q. B. 462.
(3) 15 App. Cas. 334.
(4) 18 Q. B. D. 720.

the works so selected, and pay for them, and give them to such subscribers. The question is whether the fact of their giving those engravings and giving those works of art to members selected by lot prevents them from being a society within the meaning of the Act conferring the exemption from rating. The conditions of exemption are that the society must be instituted for the purposes of science, literature, or the fine arts exclusively, and must be supported wholly or in part by annual voluntary contributions. It was not argued very strongly that this was not an association instituted for the purpose of the fine arts exclusively, but it was said that it was not supported by voluntary contributions. Several cases were cited on this question. In this case we have to construe an Act of Parliament. Decisions in previous cases cannot alter the Act of Parliament. They may teach us how to construe it, and lay down general principles for its application, but they cannot be binding authorities as to whether, on the facts in the particular case under discussion, a society does or does not come within the Act. The phrase used in the Act is "voluntary contributions." The society in question in the particular case must satisfy both those words in combination. What is the ordinary meaning of the word "voluntary"? The antithesis to it is "involuntary" or "compulsory." The question as to the meaning of the word "voluntary" in this Act came before the Court of Queen's Bench in *Churchwardens of Birmingham* v. *Shaw* (1), and Lord Denman, C.J., there delivered an elaborate considered judgment of the Court to the effect that "voluntary" in this statute means what I say it means in ordinary English—viz., the antithesis of compulsory. I see no reason to criticise that judgment adversely. The other word we have to deal with is "contributions," which is not quite so carefully dealt with by that judgment. A person is not said to contribute when he purchases something and pays for it. That is not a contribution but a payment. Contribution means a payment, no doubt; but it is not a payment of the price of any particular thing sold to the person making it, but a payment towards a general object. It seems to me impossible to call a payment for something

(1) 10 Q. B. 868.

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purchased a voluntary contribution. If one looks carefully into the cases where the exemption failed to be established, such as the cases where a reading-room was provided or newspapers were supplied, it will be found that they proceeded on the ground that what was paid was not a contribution, but the price of an advantage to be obtained by the person paying. In those cases, therefore, the exemption was not established, because taking the whole expression "voluntary contributions" together, there was a failure to satisfy it. In the case to which I have referred Lord Denman says that a contribution is voluntary if the person who makes it was not bound to make it in the first instance, and he subsequently continues not to be bound to make it. The persons who subscribe to this society certainly are not bound to subscribe in the first instance, and, if they refused to continue to subscribe, they could not be compelled by law to do so. It seems to me, therefore, that their payments are voluntary. At the time they were paid they were certainly not paid as the price of any specific thing purchased by the subscriber, unless it were something which I will presently mention. In my opinion, those payments were made to support the Art Union, and being voluntary they were, I think, voluntary contributions. But it is said that the proper inference, looking at the whole case, is that these payments are not voluntary contributions in the sense I have mentioned, but the price paid for the purchase of a lottery chance; that we ought to infer that those who make them do not do so with the intention of supporting art, but to buy a gambling chance; and in support of this contention the Act was cited which relieves such societies from the pains and penalties imposed by the enactments against lotteries. That Act is 9 & 10 Vict. c. 48. It seems to me that that statute goes far to shew that in the opinion of the legislature this is not a lottery. The Act speaks of these art unions as "voluntary associations" for the encouragement of the fine arts. If the legislature had thought that distributing pictures by chance had changed these associations from being associations for the advancement of art into gambling associations, it would not have legalized them. The legislature must have thought that these were not lotteries in the proper sense of the term, though they might

come within the words of the Lottery Acts, but only a means of promoting art. It seems to be assumed by the Act that giving pictures to the members would not make them any the less voluntary associations. I think that this Act is strongly in favour of the view which I have taken, and if we are to draw an inference of fact, I think it is a harsh and untrue inference that the people who subscribe to art unions in which pictures are distributed by chance, do so for the purpose of buying a chance of the picture, and not for the purpose of advancing art. If, as a juryman, I had to draw an inference, I should say that the real motive of the subscribers was the advancement of art. I think that their payments are not money paid for a thing purchased, but money voluntarily contributed to an institution for the advancement of art. Therefore, I think that in every sense they are contributions, and they are, within the definition in the case to which I have referred, voluntary. It follows that the appellants' society is an association which is entitled to exemption within the meaning of the Act; and, therefore, this appeal should be allowed.

KAY, L.J. This appeal raises the question whether the Art Union of London ought to be exempted from rating as an institution for promoting fine art exclusively under the provisions of 6 & 7 Vict. c. 36, s. 1. The Art Union has a charter granted on December 1, 1846, which recites that the Art Union of London was a society formed "for the general advancement of the fine arts, and for promoting and facilitating a greater knowledge and love of the arts of design on the part of the public generally," and that they had raised about 100,000*l.* by subscriptions or contributions to be allotted by chance as prizes amongst them, on condition that such money "should be expended solely and entirely in the purchase of paintings, drawings, sculpture, or other works of art," and that they had also purchased paintings and other works of art to be afterwards allotted by chance among them. The charter then proceeds to incorporate the society, and empowers any one to grant land to them, settles their constitution, and enables them to make by-laws. Under this charter and the by-laws made pursuant thereto, any person who

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contributes annually the sum of one guinea is a member of the society for one year, and is entitled to a copy gratis of the engraving of the picture of the year, which is purchased and engraved at the expense of the Union. He also has a chance of winning in the lottery a prize varying in amount from 100*l.* to lesser sums. This prize can only be used in purchasing some work of art, for which the Union will pay the amount won. If the work of art shall cost less, the winner does not get the rest of the money; but it is retained by the Union. If it costs more, the winner must pay the excess out of his own pocket. This work of art is to be exhibited in London, and the members are to have free admission. Subject to this, the winner may do what he likes with the work of art so obtained—may sell or keep it at his pleasure. However, he may not sell his right of selection. Besides these advantages, a contributor has access to the gallery of the Union, where works of art are exhibited. But it is said that the rooms are used exclusively for purposes of art, and that no newspapers are taken or refreshments provided for the contributors. An art union so constituted was freed from all pains and penalties to which it might otherwise have been liable, as being concerned in illegal lotteries, by 9 & 10 Vict. c. 48, passed on August 13, 1846. This statute also continued the indemnity granted by 8 & 9 Vict. c. 57, to similar art unions previously established. The preamble and enacting words of this statute call them "voluntary associations," and, therefore, only to such should charters be granted, where they distribute works of art by means of a lottery. The charter in this case was granted after the passing of this Act in December of the same year to this Art Union as a voluntary association.

There are two questions to be decided: first, is this a society established for the purpose of the fine arts exclusively; second, is it supported wholly or in part by annual voluntary contributions?

I do not think that the objects of the Union can fairly be said to be in any respect other than the promotion of the fine arts. Even the distribution of the engravings, and the inducements to the winners in the lottery to purchase pictures or other works of art seem to me directly to encourage and foster a taste for works of fine art.

But the objection has been based chiefly on the ground that the contributions of members are not voluntary. There are two significations which can be given to this word. The phrase used in the Act is that a society, to be exempt, must, amongst other things, be "supported in whole or in part by annual voluntary contributions." This may mean, first, that the contributions are not compulsory, or, secondly, that they are without consideration.

The first meaning would seem to be satisfied if such contributions are not made under any previous binding contract, and can be withheld at the pleasure of the donor. In this case the contributions are altogether of that nature. The second meaning requires that the contributor should obtain no advantage or, at any rate, no material and tangible return for his contribution. In this sense voluntary means the same thing as the signification given to it when we speak of a voluntary deed or voluntary bond, and the like—that is, a deed or a bond executed without consideration moving to the grantor.

The Act seems to throw some light upon the question whether this latter is the meaning of the word "voluntary" in the Act. The same section in which it is used provides that the society shall not give to its members "any dividend, gift, division, or bonus in money." I have no doubt that the words "in money" govern the whole of this sentence. It is impossible and would be insensible to read those words as applying to "bonus" only. Besides, "dividend" means a share of money, and "division" contemplates something like money which can be divided. Therefore, the only advantage to the members which the Act prohibits is a money payment. The inference is that any other advantage which would promote fine art may be given.

But, apart from the Act, the ordinary use of the phrase "voluntary contributions" is in connection with institutions such as hospitals. These are said to be supported by voluntary contributions. But in most such cases the contributor gets the advantage of recommending one or more persons to be in or out patients according to the amount of his contribution. No one can suppose that this makes his contribution less voluntary. It is voluntary because he may give or withhold it at his pleasure,

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notwithstanding that it may make him a governor of the hospital and entitle him to certain benefits in that or another character. Voluntary in such case certainly is used rather in the former than in the latter of the two meanings suggested.

I do not think there is in this case a gift or bonus in money. The prize money does not go into the hands of the winner. It is paid by the Union for the work of art which he buys. Apart from authority, I should think that the society was exempted from rating by the Act.

In one of the earliest cases—*Churchwardens of Birmingham* v. *Shaw* (1849) (1)—Lord Denman, C.J., said: "It is perhaps not easy to determine what the legislature intended by the word 'voluntary' in this combination. In several cases which have come before us different suggestions have been made, but it has never been necessary expressly to decide the point. Upon consideration, we think that annual contributions will satisfy the condition required, if they commence of the party's own choice, are so continued, and may be withdrawn at pleasure—that is, without subjecting the party to any legal liability or forfeiture beyond that of foregoing a participation in the pleasure or profit, scientific, literary, or artistic, in respect of which they have been made. If the contributor was free to commence his contribution, and incurs no legal obligation to continue it when he has once commenced, and upon ceasing to contribute will lose no more than the privileges of membership, in respect of which he became a contributor, it seems to us that he must be considered a voluntary contributor, unless we add something to the idea of voluntariness which in ordinary language it does not import; and that is what, in fact, is done by those who contend that it must be also gratuitous and bring no return of any kind to the contributor; against the addition of which particular qualification there is the further reason that the statute itself, in the clause next to be considered, provides for this expressly, and so seems to exclude the notion of its being previously implied."

In *Reg.* v. *Overseers of Manchester* (1851) (2), the Royal Manchester Institution for the Promotion of Literature, Science, and

(1) 10 Q. B. 868. (2) 16 Q. B. 449.

the Arts was held exempt, although its trust deed contained a provision that, in case of dissolution, the property should be sold and the proceeds divided among the members.

In *Reg.* v. *Gaskell* (1851) (1), a club called "The Portico" was held not to be exempt, because its purpose was not exclusively science, literature, or the fine arts. So also in *Reg.* v. *Brandt* (1851). (2)

In 1854 three cases came before the Court of Queen's Bench, in which the same kind of question was raised. In one of them, *The Russell Institution* v. *Vestry of St. Giles* (1854) (3), the institution was held not to be exempted from rating, because it was not a society instituted "for purposes of science, literature, or the fine arts exclusively." One of the purposes was the establishment of a reading-room. But Lord Campbell said: "There may be ground for contending that contribution here does not mean a voluntary annual subscription or payment of money for value received, or expected to be received, by the party paying; but means a gift made from disinterested motives, for the benefit of others . . . . The legislature may have intended to throw an additional burden on the other ratepayers of the parish by exempting from rateability property before rateable, only where it is occupied for the purpose of a society supported in part by charitable donations and not by payments made with a view to the personal accommodation and advantage of the members, although the object of their pursuits may be the cultivation of science, literature, or the fine arts. According to this construction of the statute, where the society is instituted for the purposes of science, literature, or the fine arts exclusively, it would still be necessary to inquire whether the annual voluntary contributions, by which the society is supported wholly or in part, are or are not merely the purchase-money for benefits to which the contributors thereby entitle themselves." Lord Campbell in this passage was stating the argument; it was not the ground of the decision.

In *Churchwardens of St. Anne* v. *Linnæan Society* (1854) (4), it was held that the society, being incorporated by charter for the

(1) 16 Q. B. 472.
(2) 16 Q. B. 462.
(3) 3 E. & B. 416.
(4) 3 E. & B. 793.

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cultivation of the science of natural history, was exempt from rating, notwithstanding that the fellows engaged to make annual payments, and were liable to ejection for non-payment, and were entitled to receive copies of the published transactions gratis. Lord Campbell there said: "Then, is the society maintained partly by voluntary contributions? I am clearly of opinion that it is. For, though the fellows are under an obligation to pay while they continue fellows, the payment is still voluntary, seeing that the obligation was incurred by a voluntary engagement from which the fellows are at liberty to withdraw; though I do not say that, even if they had no longer the power to withdraw, the payment would be the less voluntary." This seems to shew that, in Lord Campbell's opinion, "voluntary" meant "not compulsory" only. Erle, J., said: "It is suggested that the payments are not voluntary, because every fellow becomes liable to the payment. But this subscription is in the nature of a gift for the purpose of science, nothing being received back for the personal profit of the party paying, and it is voluntary, inasmuch as a party by withdrawing his name will cease to pay. It is quite immaterial in this question whether a party can simply cease to pay, or must withdraw his name before doing so." Crompton, J., doubted whether the contribution was voluntary, "whether the statute is satisfied by the contribution being voluntary at the time when the contributor first undertakes to pay, or whether every payment must be voluntary."

In *Marylebone Vestry* v. *Zoological Society* (1854) (1), the society was held not exempt, because their premises were not occupied exclusively for purposes of science. Part was used as a flower garden. The public were admitted, and refreshments and a band were provided. An opinion was also intimated by two of the learned judges that the contributions of members were not voluntary, because a subscriber would look to the amusement which he and his family and friends, whom he was allowed to introduce, would derive from their access to the gardens. Contributions, said Erle, J., are not voluntary, "where the intention is to purchase a private convenience, as is the case, I believe, with many institutions which also embrace scientific objects." This view

(1) 3 E. & B. 807.

seems rather to confound the words "voluntary" and "exclusively."

In *Liverpool Library* v. *Mayor of Liverpool* (1860) (1), the test whether contributions were voluntary was said to be that the society could not enforce payment, though they might forfeit the shares of members for non-payment. The books of the library were circulated among the subscribers and strangers introduced by them according to the rules. The members' shares were saleable and were of some value. The society was held to be exempt. Bramwell, B., pointed out that societies within the Act were not prohibited from making any gift, unless it be a gift in money, evidently meaning that any gift for the promotion of science, literature, or art would not render a payment to a society formed for those objects other than voluntary.

The statute 48 & 49 Vict. c. 51, whereby a duty is imposed at the rate of 5 per cent. upon the annual value of property vested in bodies corporate or unincorporate, which escape liability to probate, legacy, or succession duty, excepts by s. 11, sub-s. 6: "property acquired by or with funds voluntarily contributed to any body corporate or unincorporate within a period of thirty years immediately preceding." It was held in the case of the *New University Club* (1887) (2), that this did not exempt property obtained by the subscriptions to an ordinary London club, such subscriptions not being money voluntarily contributed within the meaning of the Act. In that case "voluntarily" seems to have been construed as meaning without consideration, and not including a payment for value received or to be received.

Under the later statute, 48 & 49 Vict. c. 51, s. 11, the question came before the House of Lords in *Commissioners of Inland Revenue* v. *Forrest.* (3) The House held the society exempt, Lord Halsbury dissenting. Lord Halsbury treated the two Acts I have referred to as practically identical on the question of exemption, and considered that the Institution of Civil Engineers being "a professional society founded for the advantage and in the interests of the profession of civil engineers, supplying most valuable and important means for the training and instruc-

(1) 5 H. & N. 526. (2) 18 Q. B. D. 720.
(3) 15 App. Cas. 334.

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tion of that profession, but for the interest and advantage of the members of the institution as members," was not within the exemption. Lord Watson, on the other hand, thought that the two Acts differed so much in their subject-matter and scope that decisions under the former Act were of little value in construing the later one. The society held meetings at which papers on engineering subjects were read and discussed. These discussions were afterwards printed and copies sent to every member. In a former case (1) the institution had been held not to be exempted under 6 & 7 Vict. c. 36, on the ground that it was not established exclusively for the purposes of science, literature, or the fine arts. Lord Watson said that in order to bring a society within the statute, 6 & 7 Vict. c. 36, "two statutory requisites must concur. The society must be one instituted exclusively for purposes of science, literature, or the fine arts, and it must also be supported in whole or in part by annual voluntary contributions." "I do not think," he continued, "the legislature intended that fixed yearly payments, which individuals agree to make in consideration of their being admitted to a society, and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues) should be regarded as voluntary contributions within the meaning of the Act. But the contrary was decided after some hesitation, and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me to have been mainly due." Lord Macnaghten insisted upon the difference between the two statutes, and relied on Lord Campbell's dictum, which I have quoted, that to bring a society within the exemption in the earlier Act it should in some degree partake of the nature of a charitable institution, as distinguishing the provisions of the two statutes. This was not a decision upon the statute we have to consider. The remarks made by Lords Watson and Macnaghten upon this statute were merely for the purpose of contrasting the later statute under which they held the Institution of Civil Engineers exempt. Lord Watson's language, to the effect that contributions under 6 & 7 Vict. c. 36 are not voluntary where members are under a

(1) 5 Q. B. D. 48.

legal obligation to make such payments while their membership continues, does not include the present case where there is no such legal obligation. It also shews that in his opinion such an obligation was essential to make the payment other than voluntary.

The various dicta which I have cited are not reconcileable. There is no decided case which governs the present, unless it be *Churchwardens of Birmingham* v. *Shaw* (1), *Liverpool Library* v. *Mayor of Liverpool* (2), and *Churchwardens of St. Anne* v. *Linnæan Society* (3), in all of which the societies were held to be exempt from rating, although the members did get certain positive and tangible advantages by subscribing. But none of the cases is binding on this Court.

For the reasons I have given, I think that this society should be held to be exempt from rateability.

A. L. SMITH, L.J. I have the misfortune to differ from the Master of the Rolls and Kay, L.J., and the following is the conclusion at which I have arrived.

This case raises once more the vexed question as to what constitutes a "society instituted for the purposes of science, literature or the fine arts exclusively, provided that such society be supported wholly or in part by annual voluntary contributions," so as to be exempt from being rated.

The point is whether the Art Union of London, which, in my judgment, obtains its funds by means of the inducement held out by a lottery legalised for the purpose, is such a society. The Queen's Bench Division (Wright and Collins, JJ.) have held that it is not, and hence the present appeal.

Upon reading s. 1 of the Act of 1843 (6 & 7 Vict. c. 36), it is obvious that, to bring a society within the exemption contained therein, it must be: firstly, a society instituted for the purpose of science, literature, or the fine arts exclusively; secondly, a society which is supported wholly or in part by annual voluntary contributions; thirdly, a society which shall not, and by its by-laws may not, make any dividend, gift, division, or bonus

(1) 10 Q. B. 868. (2) 5 H. & N. 526.
(3) 3 E. & B. 793.

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in money unto or between any of its members; and, fourthly, a society which shall have obtained the prescribed certificate of a barrister or the Lord Advocate. If either of these requisites is wanting, the society is not exempt from being rated for the tenements it possesses.

In my judgment, each of these heads is distinct and must be treated separately.

The Art Union of London was established in 1837, and it appears from its charter of incorporation and by-laws granted and made in the year 1846, that the society was founded for the general advancement of the fine arts in the British empire, and for promoting a greater knowledge and love of the arts of design on the part of the public generally, and for giving encouragement to artists beyond that afforded by the patronage of individuals, and that its object was to carry out such public encouragement of the fine arts in good faith according to the provisions of 9 & 10 Vict. c. 48, and not to advance private or individual trading, gain, or profit. The Act of 9 & 10 Vict. c. 48, was an Act passed to legalise the allotment and distribution by chance of prizes by art unions amongst their members, who otherwise would have rendered themselves liable to the pains and penalties of the Lottery Acts. It appears that the society had raised 100,000*l.* which was to be allotted and distributed by chance as prizes amongst the members, on the condition that the sums so allotted and distributed should be expended solely and entirely in the purchase of paintings, drawings, sculpture, or other works of art, and that paintings and other works of art had also been purchased to be in like manner allotted and distributed by chance amongst the members of the society. Any one may become a member of the society for a year upon payment of a subscription of one guinea. In consideration of this payment the member is entitled to an engraving of one of the original works purchased for the society, or a large bronze medal, or by increased payment, to a bust or vase, or statuette, or other work, and in addition, one chance in the annual distribution of prizes which are drawn by lot. Prizes in works of art to large amounts in value may be obtained by a successful drawing in this lottery. If a member has subscribed ten years

in advance, he is entitled to a porcelain bust or other work as a bonus, in addition to the annual advantages attached to his subscription; and if a member has subscribed 10 guineas in successive years without gaining a prize, he is entitled to a porcelain bust or other work of art; and this is called a consolation prize. It is stated in the album published by the society that, "over and above the broad ground of the elevation of public taste and the benefits conferred on artists, the council would point out that looking to the probable extinction of line engraving at no distant period, there is now an opportunity of acquiring fine impressions, and, in many cases, invaluable artists' proofs of important plates engraved for the society after the first English painters, the value of which, in a few years, must rise to many times their present cost, an opportunity which can never recur when once the Art Union's stock is exhausted." These subscriptions, after paying rent, taxes, and salaries, and other necessary expenses, and after providing a reserve fund, are devoted to the purchase of pictures, drawings, enamels, sculpture, models, engravings, and other works of art, and no individual gift, division, or bonus in money is made unto or between any of its members.

These being the facts, I come to consider the first point. Is the Art Union of London instituted for the purpose of the fine arts exclusively? This is how Lord Watson puts it when dealing with this point in *Commissioners of Inland Revenue* v. *Forrest*. (1) He says: "The society must be one instituted exclusively for the purpose of science, literature, or the fine arts . . . It is not a sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine arts. One or other of these must be its exclusive object; so that an institution, which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption." I understand by this that, if the other object be an object distinct from and not connected with the fine arts, then the society, even though that object be altogether subsidiary, has not as its exclusive object the promotion of the fine arts, but, if the other

(1) 15 App. Cas. 334.

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object be only a means to the one end, i.e., as in this case, a lottery whereby to draw money from the public for the promotion of the fine arts, then the society has a sole and exclusive object, and not another object subsidiary thereto.

I find that the society has also the object of "giving encouragement to artists beyond that afforded by the patronage of individuals," and this raises a question similar to that so much debated in the House of Lords in *Commissioners of Inland Revenue* v. *Forrest* (1), viz., whether the object of the society was for the benefit of individuals or for the promotion of the fine arts.

Upon consideration I think that the right conclusion to draw is that the object of the Art Union of London is the promotion of the fine arts exclusively, though as incidental to that object the lottery is brought into play, and some painters and artists are benefited whose works happen to be appreciated; and, consequently, the Art Union of London has established, within the meaning of the Act of 1843, that it is instituted for the purpose of the fine arts exclusively.

I now come to the second point, which has been the source of many decisions not altogether in harmony, as to what is a society supported wholly or in part by annual voluntary contributions.

It appears to me impossible to hold that a society supported by annual voluntary contributions within the meaning of the Act is merely a society in contradistinction to one supported by annual compulsory contributions, for where is there a society instituted for the purposes of science, literature, or the fine arts exclusively, which is supported in whole or in part by compulsory contributions? There is no such society, for all contributions to such are otherwise than compulsory, and unless it is to be held that a society fulfilling the first requirement, that is, being exclusively for the purposes of the fine arts, necessarily embraces every such society, some limitation, as it appears to me, must be placed upon the term "annual voluntary contribution." The phrase, it will be noticed, is "annual voluntary contribution," not "annual voluntary payment." In *The New University Club Case* (2), where the question arose upon the words in the Customs and Inland Revenue Act, 1885, "a property

(1) 15 App. Cas. 334. (2) 18 Q. B. D. 720.

acquired by or with funds voluntarily contributed," I set out and discussed the cases decided upon the Act of 1843, commencing with that of *Churchwardens of Birmingham* v. *Shaw* (1) in the year 1849, with the exception of *Reg.* v. *Brandt* (2), and I do not propose to recapitulate them here, for they will be found at pp. 735–738 of the report of that case, and more especially as Kay, L.J., has dealt with them to-day. Since the judgment in *The New University Club Case* (3) was delivered in 1887, the Act of 1843 has come up for discussion for the first time in the House of Lords in the case of *Commissioners of Inland Revenue* v. *Forrest* (4), and Lord Watson gave a definition of what constitutes a voluntary contribution. He says: "I do not think the legislature intended that fixed yearly payments which individuals agree to make in consideration of their being admitted to a society and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues) should be regarded as voluntary contributions within the meaning of the Act. But the contrary was decided after some hesitation"—I understand this to be the decision of Lord Denman in *Churchwardens of Birmingham* v. *Shaw* (1)—"and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me to have been mainly due." This definition of Lord Watson clearly embraces a subscription to a club by one of its members, and shews that such a subscription would not be a voluntary contribution within the meaning of the Act, and that *The New University Club Case* (3) was rightly decided. Lord Macnaghten in the same case approved of a definition given by Lord Campbell in *Russell Institution* v. *Vestry of St. Giles* (5), viz., "the legislature may have intended to throw an additional burden on the other ratepayers of the parish, by exempting from rateability property before rateable, only where it is occupied for the purposes of a society supported in part by charitable donations and not by payments made with a view to the personal accommodation and advantage of the members, although the objects of their

(1) 10 Q. B. 868.
(2) 16 Q. B. 462.
(3) 18 Q. B. D. 720.
(4) 15 App. Cas. 334.
(5) 3 E. & B. 416.

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pursuits may be the cultivation of science, literature, or the fine arts," "so that to bring itself within the exemption a society must have no purpose besides those specified in the Act, and must also in some degree partake of the character of a charitable institution. On these two conditions all the cases decided under the Act of 1843 seem to have turned." Lord Halsbury disapproved of this definition, but if it is to apply, it also shews that a club subscription, though obviously in its inception a voluntary as distinguished from a compulsory subscription, is not within the Act. Whether it be under the Act of 1843 or the Customs and Inland Revenue Act, 1885, the terms "annual voluntary contributions" or "funds voluntarily contributed" must have some limitation placed upon them other than compulsory contributions, for it is not every payment not made under compulsion which constitutes a society supported "in whole or in part by annual voluntary contributions." The question is what is that limitation, and here is the difficulty. I will not attempt an exhaustive definition; others have done so, and not with complete success, as will be found upon reading the reports, but I will take a concrete case to express what my conception is of the term, "a society supported in whole or in part by annual voluntary contributions." I take the familiar case of the annual contributions made to hospitals which are supported by voluntary contributions. These appear to me to be the kind of contributions aimed at by the Act. To describe them I will use words which I find in Lord Campbell's judgment in *Russell Institution* v. *Vestry of St. Giles* (1); they are not "payments of money for value received or expected to be received by the party paying, but gifts made from disinterested motives for the benefit of others."

In my judgment, if the facts shew that a payment is made to a society for value received, or expected to be received, i.e., that the object of the subscriber is to obtain material advantage to himself, then it is not a society supported in whole or in part by annual voluntary contributions, so as to come within the exemption in the Act; but, if the contribution be made by way of gift from disinterested motives for the benefit of others, it does. It

(1) 3 E. & B. 416.

is true that in each case it may be said that the contributions are voluntary, because they are not made under compulsion, but the distinction between the two cases is obvious and real, and in my judgment the above is the true meaning of the Act. I should not myself think that the object of a subscriber to a hospital supported by voluntary contributions was material advantage to himself, though it may be he gets an indoor or outdoor ticket which he may distribute to others as he pleases. The object of the donation to the hospital is the benefit of the hospital and of others.

But it is said that this is not the true reading, because the third requirement of the Act enacts that the society must be one which shall not, and by its by-laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and that, as only a money benefit to a member is prohibited in this requirement, any other benefit is permitted, and consequently a subscription given to a society with the express object of obtaining material advantage to the subscriber, though not in money, constitutes it a society supported wholly or in part by voluntary contributions within the other requirement. With all deference I do not agree in this. One thing appears to me clear, viz., that all contributions to societies instituted for the purpose of science, literature, or the fine arts exclusively, are made in one sense voluntarily, in this that they are not made compulsory, and, if it be held that the effect of the third requirement is to render all contributions voluntary contributions within the meaning of the Act, which are not made with the object of obtaining a return in money, the second requirement with reference to the necessity of a contribution being voluntary, so that the society may obtain the exemption, is wholly superfluous; and this leads me to the conclusion that this is not the correct reading of the Act. As before stated, in my opinion some limitation must be placed upon the term "annual voluntary contributions" other than the fact that they are not compulsory, and the limitation in my opinion is that which I have endeavoured to express. I cannot bring myself to hold otherwise than that the object which prompts the subscribers to pay a guinea or more, as the case may be, to the Art Union of London is the

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hope and expectation of gaining in the legalised lottery what every subscriber has an equal chance of obtaining, viz., a prize, and the other material advantages attaching to the subscriptions to stimulate which the lottery was expressly brought into existence; and I cannot say that these subscriptions are gifts made from disinterested motives for the benefit of others, so as to be annual voluntary contributions within the meaning of the Act; and, this being so, I am of opinion that the society fails to prove the second requirement, and that the judgment of the Queen's Bench Division must be affirmed.

It is unnecessary to discuss the third requirement further, or the fourth, for no question now arises thereon. For the reasons above given I think that this appeal should be dismissed.

Appeal allowed.

Solicitors for appellants: *Hopgoods & Dawson.*
Solicitors for respondents: *B. H. & E. Van Tromp.*

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May 22, 23, 24; *July* 9.

[IN THE COURT OF APPEAL.]

CHAMBER COLLIERY COMPANY, LIMITED *v.* COMPANY OF PROPRIETORS OF THE ROCHDALE CANAL.

Canal Company—Right to support for Canal—Mines under or near Canal—Compensation for not working Mine—Apprehended Danger to Canal from working of Mine—Right of Action for Injury to Canal—Undertaking by Canal Company not to Sue.

By a special Act of Parliament, by which the defendants were empowered to make a canal, it was provided that the right of the owners of the lands, on or through which the canal was to be made, to mines and minerals should be reserved, with power to work the same, not thereby injuring the canal. It was further provided that, if the owners should in working such mines work near to or under the canal, so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the owners of the mines to endanger or damage the further working of the same, it should be lawful for the company to treat and agree with the owners for all such minerals as might be thought proper to be left for the security of the canal; and, in case they should not agree, then a jury should be summoned to assess what satisfaction such owners ought to receive from the company on being restrained from working such minerals.

The plaintiffs, who were owners of coal-mines under and near the defendants' canal, gave to the defendants a notice to treat under the above-mentioned

provisions for the satisfaction to be made to them in respect of coal proper to be left for the security of the canal, and, the defendants taking no steps in the matter, brought an action for a declaration that they were entitled to have such satisfaction assessed and paid to them under the Act. This action was referred for trial to a referee, who found that the working of the mines under and near the canal would not injure the mines, but would cause a subsidence of the canal, which would not interfere with the navigation of the canal, but would necessitate slight repairs to towing-paths, &c. The defendants offered to undertake that they would not object to the working of the coal under or near the canal, and would not make any claim against the plaintiffs in respect of damage that might be done to the canal, towing-paths, &c., by such working, but would at their own expense repair the same:—

Held, that, upon the defendants' giving such an undertaking, the plaintiffs were not entitled to have satisfaction ascertained and paid to them for coal to be left for the security of the canal under the above-mentioned provisions.

APPEAL from the order of a Divisional Court (Cave and Wills, JJ.) refusing to set aside the judgment of a special referee, and to enter judgment for the defendants upon the findings of such referee.

The facts were as follows.

The action was brought by a colliery company against a canal company, claiming, first, a declaration that the plaintiffs were entitled to have it ascertained what portions of the mines specified in a notice dated December 30, 1890, ought, having regard to the 39th and 40th sections of 34 Geo. 3, c. 78, to be left by the plaintiffs, and what compensation was payable by the defendants in respect of the said portions of the said mines; secondly, that the portions of the said mines so to be left, and the amount of compensation so payable, might be ascertained and declared; thirdly, that the defendants might be ordered to pay to the plaintiffs the amount of such compensation when ascertained; fourthly, that the defendants might be ordered to do or concur in doing all things necessary for the purposes aforesaid.

By s. 39 of 34 Geo. 3, c. 78 (The Rochdale Canal Company's Act), it was provided that "nothing herein contained shall extend to defeat, prejudice, or affect the right of the lord or lords, lady or ladies of any manor or manors, or the owner of any lands, in, upon, or through which the said canal, cuts, and reservoirs, or any of them, or any towing-paths, wharfs, quays, trenches, sluices, passages, watercourses, or conveniences aforesaid,

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shall be made, to the mines or minerals lying and being within or under the lands to be set out or made use of as aforesaid, but all such mines and minerals are hereby reserved to the lord or lords, lady or ladies of such manor or manors, and the owner of such lands respectively, and it shall be lawful for the lord or lords, lady or ladies of such manor or manors, and the owner of such lands respectively (subject to the conditions and restrictions herein contained) to work, get, drain, take, and carry away, to his or her own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said canal, cuts, and reservoirs, towing-paths, wharfs, quays, trenches, sluices, water-courses, or other the conveniences aforesaid or any of them."

By s. 40 it was provided that "if the owner or worker, or owners or workers, of any coal or other mine or mines shall, in pursuing or working such mine, work near to or under the said canal, cuts and reservoirs, or any of them, so as in the opinion of the said company of proprietors to endanger or damage the same, or in the opinion of the owner or worker, owners or workers, of the said mine or mines, to endanger or damage the further working thereof, then it shall be lawful for the said company of proprietors to treat and agree with such owner or worker, or owners or workers, for all such coals or other minerals as may be near or under the said canal, cuts, and reservoirs, or any of them, as shall be thought proper to be left for the security or preservation of the said canal, cuts, and reservoirs, or any of them; and in case the said company of proprietors, and such owner or worker, or owners or workers, of such mine or mines, shall disagree touching the satisfaction to be made for such coal or other minerals, then it shall be lawful for the said commissioners, at the request of the said company of proprietors, or of such owner or worker, owners or workers, of such mine or mines, to cause a jury to be summoned and impannelled in the manner herein directed, who shall, and they are hereby authorized and required, by such ways and means as aforesaid, to assess and determine what satisfaction such owner or worker, owners or workers, of such mine or mines, ought to have and receive from the said company of proprietors, on being restrained from working such mine or mines; and, upon payment or satisfaction made to such

owner or worker, owners or workers, of such mine or mines, by the said company of proprietors, according to the verdict or judgment of such jury, such owner or worker, owners or workers, of such mine or mines, shall be, and he, she, or they, is or are hereby perpetually restrained from working such mine or mines within the limits for which satisfaction shall be by the said jury adjudged and declared to extend."

On December 30, 1890, the plaintiffs served a notice on the defendants that they were about to work their mines near to the canal, and would thereby endanger the canal, and that they were ready to treat with the canal company for the coal proper to be left for the security of the canal, and that, if they could not agree, they would require the canal company to take such steps as were necessary to have the satisfaction payable to the colliery company ascertained. The canal company took no step, and accordingly on March 18, 1891, the plaintiffs brought the action. By an order dated February 1, 1893, the action was referred for trial to Mr. Gully, Q.C., who was to have all the powers of a judge of the High Court, and might direct judgment to be entered. Previously to such order, by letter dated January, 24, 1893, the defendants' solicitors informed the plaintiffs' solicitors that the defendants were willing that the plaintiffs should get the whole of the coal in question, and to covenant that the defendants should not be entitled to make any claim against the plaintiffs in respect of any consequent damage to the canal. By his award, dated January 19, 1894, the referee stated his findings specially in substance as follows: (1.) that there was no reasonable ground for apprehending that the working of the mines near or under the canal would cause damage to the mines, or to the further working thereof, by percolation of water from the canal to the mines; (2.) that the working within the pillars set out by him in red lines upon a certain plan would cause a subsidence of the canal between the points A and C; (3.) that such subsidence would not interfere with the navigation of the canal; (4.) but such subsidence would necessitate repairs from time to time during a period of eight or ten years to the towing-path and banks of the canal, and probably to bridges at A and B on the plan; (5.) that the cost of such

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repairs would not exceed 1200*l.* in the whole; (6.) that, if the coal was left unworked within the limits marked out by him, the defendants should pay to the plaintiffs 12,688*l.*; and he gave judgment to the effect that such coal should be left and the defendants should pay to the plaintiffs that amount of compensation.

On appeal by the defendants the Divisional Court affirmed the judgment of the referee.

Sir H. James, Q.C., and *Joseph Walton, Q.C.* (*Mc Swinney*, with them), for the defendants. In this case the referee has found that, if the coal is worked, there will be no damage to the mines by percolation, and no injury to the canal which will prevent the navigation of it. The sole injury which will result is some subsidence of the towing-paths, &c., that can be repaired for 1200*l.* In the case of *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (1), it was no doubt held that the mine-owner is entitled to proceed under such enactments as these, where the working of the mine, under or near the canal, might render him liable to damages for injuring the canal. But in this case the defendants have offered, and still adhere to the offer, to undertake not to sue the plaintiffs for any injury that may be occasioned to the canal by such working, and to repair such injury themselves. That being so, it cannot now be said that the further working of the mines is "endangered or damaged," or that it is proper that this very large quantity of coal should be left unworked for the security of the canal, and the canal company be obliged to pay for it, although they do not want it left, and are willing to take the risk. (2)

Sir R. E. Webster, Q.C., and *O. Leigh Clare* (*J. A. Tweedale*, with them), for the plaintiffs. The defendants' offer was not made until after action brought. *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (1) decided that the mine-owner is entitled to proceed, and to have compensation assessed under such enactments as these, where, having regard to the proximity of his workings to

(1) 14 App. Cas. 248.

(2) Other points were argued, but, as will be seen, the judgment renders it unnecessary to set out the argument with regard to them.

the canal, and his obligation under the statute not to injure the canal, he is in danger, if he works further, of becoming liable for a breach of that statutory obligation. The intention of the Act is that, in the interests of the public as well as the company, all possibility of injury to the canal by the working of the mines under or near it shall be prevented, and that for that purpose the mine-owner shall be bound to leave the coal unworked, and be entitled to compensation for it. It is very doubtful whether such an undertaking as is offered by the canal company would not be ultrà vires, for they are bound to maintain the canal in the interests of the public; and conceivably they might not pecuniarily be in a position to repair the damage which might be occasioned to the canal, if the mines under and near to it were worked. The Attorney General would have a right to interfere in the interests of the public, and enforce against the mine-owner his statutory obligation not to injure the canal.

The plaintiffs can only be compelled to accept the terms offered by the defendants, if they are not injured by them. The plaintiffs cannot now be put into the same position as they were in at the time when the notice to treat was given, for their workings have since been at a standstill. They are now full of water, and the plaintiffs cannot get the coal, at any rate, without great additional expense.

Sir H. James, Q.C., in reply. It is contended that in this case there is no statutory obligation on the canal company to maintain the canal. But, however that may be, the referee here has found that any damage to the canal which may be apprehended would not be such as to interfere with the navigation of it, and therefore the interests of the public will not suffer, and there would be no locus standi for interference by the Attorney General. His right of interference could only be as against the canal company to compel them to give facilities for navigation, not as against the mine-owner. In any case he would have to shew that the mine-owner had committed a wrong as against the canal company. But, if the canal company consent to the workings, there would be no wrong as against them. It was held in *In re Norwich Provident Insurance Society* (1) that a

(1) 8 Ch. D. 334.

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corporation or company has, as incident to its existence, the same power of compromising claims made against it as an individual.

The plaintiffs ought to have proceeded with their workings as soon as the defendants made their offer in 1893.

Cur. adv. vult.

July 9. LORD ESHER, M.R. In this case there was a dispute between the owners of a canal and the owners of mines near to and under the canal. The mine-owners brought an action on the ground that, if they worked their mines in the usual way, in all probability the canal would be injured; and, if so, the canal company would have an action against them, and, therefore, they could not work their mines in the usual way, and they required a declaration of their rights under the provisions of the Act of Parliament applicable to the case in order to protect them. The action was referred to Mr. Gully, Q.C., and he heard all the evidence, and has found as a fact that there is no reasonable ground for apprehension that the working of the mines near or under the canal would cause damage to the mines by percolation. Secondly, he has found that the working without leaving pillars between the red lines on the plan would cause subsidence of the canal between the points A and C; but that such subsidence would not interfere with the navigation of the canal, but only necessitate certain repairs during eight or ten years to the towing-paths and banks, and probably to certain bridges, the total cost of which repairs would not be more than 1200*l.* He has further found that, if the coal is not worked within the lines he has indicated on the plan, no damage would arise at all to the mines or the canal, and that the coal included within those lines should be left unworked, and the canal company should pay for the coal the sum of 12,688*l.* That decision has been brought before us by way of appeal. The counsel for the canal company on their behalf offered before us, and also in the Court below, to undertake that the plaintiffs might work the coal as they pleased, and, if they did thereby injure the canal, the canal company would not sue them, but would remedy such injury themselves. Upon that state of things we are called upon to decide what order we shall make.

An enactment such as that now in question has been construed by the House of Lords in *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (1) to mean that, if the mines will be injured by working under the canal, the mine-owner can complain under the Act; and, if the canal will be injured, the canal-owner can do so; and, furthermore, that, although the working of the mines under or near to the canal will not injure the mines, yet if it will injure the canal, and the mine-owner will thereby be rendered liable to an action, the mine-owner will be entitled to complain and obtain satisfaction under the Act. But that case only determines what the mine-owner's complaint may be, and that, if the mine-owner makes good that he will incur that danger by working the coal, he is entitled to the benefit of the Act. The mere fear or complaint of either party will not determine the case. It must go before the tribunal, and the tribunal must decide whether that complaint or fear is justified. Here, taking the findings of the referee, it appears that there is no reasonable ground for thinking that the working of the mine under the canal will cause danger to the mines. But it appears that working the mines within the lines indicated on the plan would cause subsidence of the canal between the points A and C. If the case rested there, the mine-owners would have made good their complaint, and would be entitled to protection under the Act. The protection they have obtained is an order that they should leave coal of the value of 12,688*l.* unworked, and that the canal company should in respect of their leaving that coal unworked pay them that amount. But what is the injury to the canal, to provide against which this heavy obligation is laid on the canal company? The injury would be so slight that the subsidence caused would not interfere with the navigation of the canal. That would prevent any public authority, such as the Attorney General, from complaining; because all such an authority could complain of would be the interference with the navigation. But it is said that repairs would be necessitated from time to time during eight or ten years to the towing-paths and banks, and probably certain bridges, which repairs would not cost altogether more than 1200*l.* If there had been no offer on the part of the canal company,

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I will not say that the Court would not have been obliged to decide that the mine-owners had a right to leave the coal unworked so as to prevent that damage, and in respect of the coal so left to be paid 12,688*l*. But it is said on behalf of the canal company that the mine-owners need be under no apprehension; that the canal company will undertake that, whatever damage may be done by working the mines near or under the canal, they will not sue the mine-owners, but will remedy that damage at their own expense; so that the ground of the mine-owners' complaint is cut from under them. Under these circumstances, it seems contrary to justice and the true interpretation of the Act that the mine-owners should be entitled to insist that this amount of coal should be left, and that they should receive as compensation for it the large sum of 12,688*l*. For these reasons I think the appeal should be allowed. The costs are to be dealt with, as will be presently mentioned by Kay, L.J.

KAY, L.J., read the following judgment. The action is by a colliery company against a canal company. On December 30, 1890, the colliery company served notice on the canal company that they were about to work their mines near to the canal, and would thereby endanger the canal, and that they were ready to treat with the canal company for the coal proper to be left for security of the canal, and, if they could not agree, they would require the canal company to take such steps as were necessary to have the satisfaction payable to the colliery company ascertained. The canal company took no step, and accordingly on March 18, 1891, the colliery company brought this action for a declaration of their right to have it ascertained, under ss. 39 and 40 of 34 Geo. 3, c. 78, what portion of coal ought to be left, and what compensation the canal company should pay. By an order dated February 1, 1893, the action was referred to Mr. Gully, Q.C., who was to have all the powers of a judge of the High Court, and might direct judgment to be entered. By his award, dated January 19, 1894, the arbitrator has found: (1.) that there is no reasonable ground for apprehending that the working of the mines near or under the canal will cause damage to the mines, or to the further working

thereof, by the percolation of water from the canal to the mines; (2.) that the working within the pillars set out by him in red lines upon the plan would cause a subsidence of the canal between the points A and C; (3.) that such subsidence would not interfere with the navigation of the canal; (4.) but that it would necessitate repairs from time to time, during a period of eight or ten years, to the towing-path and banks of the canal, and probably to bridges at A and B; (5.) that the cost of such repairs would not exceed 1200*l.* in the whole; (6.) if the coal is left unworked within the limits marked out by the arbitrator, he finds that the canal company should pay to the colliery company 12,688*l.*

The appeal of the canal company raises several questions. Adopting the findings that the working of the mines would not cause damage to the mines by the percolation of water, and would not interfere with the navigation of the canal, although such working would cause a subsidence of the canal, the canal company offer to release the colliery company from all claims and liability in respect of such subsidence, and ask for judgment in their favour.

According to the decision of the House of Lords in *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (1), the liability on the part of the colliery company to compensate for any subsidence justified their bringing the present action, although their mines will not be directly damaged, because they had reached a point at which they found that, having regard to the proximity of the canal and their statutory liability, they could not work further without some danger, or could not work further to the same advantage as if the canal were not there. We are bound, therefore, to hold that the action was properly instituted. But, having regard to this offer of the canal company, is it necessary to compel the mine-owners to leave this large barrier of coal, and is it proper to compel the canal company to pay 12,688*l.*? If it be the case, as we must assume upon these findings, that the navigation of the canal will not be interfered with, the interest of the public is not involved, whether the mines are worked or not. Counsel for the colliery company are instructed to say that the workings

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in the particular locality, having been stopped so long, have filled up, and that the coal near or under the canal cannot now be worked, or cannot be worked without additional expense. But the offer now made was made by letter on January 24, 1893, and there is no reason to suppose that, if accepted then, the working could not have been carried on in the usual way without any extraordinary expense to the colliery company.

If the canal company give an undertaking to the Court that they will not object to the working of the coal under or near the canal between the points A and C, and will at their own expense repair any damage that may be done to the canal, or the banks or towing-paths thereof, by reason of such working, and will not make any claim upon the colliery company in respect of such damage; I think that upon such undertaking no order should be made upon the colliery company to leave any coal, or upon the canal company to pay to them any compensation.

There should be an inquiry before Mr. Gully what, if any, damage the colliery company have suffered by leaving the coal in this part of their mines unworked from the date of their notice of December 30, 1890, to the offer of the canal company on January 24, 1893.

The costs of the action to the last-mentioned date should be paid by the canal company, and since that date by the colliery company, including the costs of the arbitration and appeal, except so far as such costs may have been increased by any contention on the part of the canal company that the canal or towing-path would not be injured in any way. The costs of the further reference should be dealt with by the arbitrator.

A. L. SMITH, L.J. This is an action by mine-owners, founded upon ss. 39 and 40 of the Act of 34 Geo. 3, c. 78, wherein they ask for a declaration that they are entitled to have ascertained what portions of their minerals are to be left by them unworked lying near and under the canal of the defendant company, and what compensation is to be paid to them by the canal company in respect thereof.

The position of a mine-owner towards a canal proprietor, under sections similar to the present, was dealt with by the House of

Lords in the case of *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (1), and it was therein held that a canal proprietor was in a position to set in motion the machinery of the commissioners and jury mentioned in s. 40 in one set of circumstances, and the mine-owner could do the like in two other. It was decided that a canal proprietor could take action if injury was likely to occur to his canal by the further working by the mine-owner of his minerals adjacent to or underneath the canal, in which case proceedings could be had under s. 40 in order to ascertain what minerals "should be thought proper to be left for the security or preservation of the canal," and what satisfaction should be paid by the canal company to the mine-owner for such minerals. It was also decided that a mine-owner might set this machinery in motion if injury was likely to occur to his mine, as, for instance, by being flooded by percolation of water from the canal, if the mine-owner proceeded further with his workings; and in this case, also, it was to be ascertained what minerals should be thought proper to be left for the preservation and security of his mine, and paid for by the canal company. It was further decided that a mine-owner could also set this machinery in motion to have ascertained what minerals were thought proper to be left and paid for by the canal company where, having regard to the proximity of his workings to the canal, and his obligation under the statute to the canal proprietors not to injure, prejudice, or obstruct their canal, he could not venture to continue the further working of his mine because of anticipated injury to the canal which might render him liable to an injunction, and, if injury did thereby occur, to an action for damages by the canal company.

The first question in this case is whether, when a mine-owner is taking proceedings under s. 40, and all he can establish is a gradual surface damage to the banks and tow-paths, and possibly to the bridges of a canal, but no injury to the canal itself or its navigation or to the mine, he is entitled as of right to have it declared that coal shall be left and paid for by the canal company, neither the safety of the mine nor the safety of the canal

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requiring it, and when the canal company is willing to covenant, if the coals are won and the anticipated surface damage does occur, that no action shall be brought against the mine-owner. It was said by the plaintiffs' counsel that the case in the House of Lords had decided that even in such a case minerals *must* be left and paid for.

The case of *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (1) was a case in which a canal company had been actually injured by the workings of a mine-owner, and the canal company sought to recover damages from the mine-owner for such injuries. It was urged by the mine-owner, in opposition to this claim, that, inasmuch as before some of the workings had taken place the mine-owner had given notice to the canal company that he was about to work his minerals, and as the canal company had never offered to pay for them, the mine-owner was entitled to do what he pleased with his own (working in due course), irrespective of results; but it was held that, if a mine-owner proceeds with his workings, which in fact do damage to a canal, he does so at his peril, for he might have instituted proceedings under the section to have had ascertained what minerals should have been thought proper to be left for the security of the canal; in which case the mine-owner would be paid by the canal company for what minerals were ascertained to be proper to be left: and that, as he had not done so, the canal company was entitled to recover damages as claimed. This does not shew that, in proceedings under the section by the mine-owner against a canal company on account of an apprehended action, he is entitled as of right under any set of circumstances to have minerals left and paid for. All it shews is, that the mine-owner may proceed under the section, and thus make himself in all ways safe. If in a particular case he can be made safe without leaving his coal, why should it be thought proper for the security of the mine-owner that it should be left where it is not necessary that it should be?

What is to be determined must in my judgment depend upon the circumstances of each case as it arises, though, if actual injury

(1) 14 App. Cas. 248.

to the mine-owner or canal proprietor is to be apprehended, the leaving of coal is the primâ facie way to bring about this safety. The plaintiffs in this action launched their claim upon the two grounds which *Knowles' Case* (1) has decided were open to them, the first and main ground being that injury would be done to their mine by reason of the canal cracking, and the water in that part of the canal situated between the two locks getting out and into the mine if they continued their workings; the second being that such injury would be done to the canal as would render them liable to an injunction and damages at the suit of the canal company, and they asked that upon each ground minerals might be directed to be left by them to be paid for by the canal company. Mr. Gully, the arbitrator, has found, as to the first claim, that no injury would be occasioned to the plaintiffs' mine or the further working thereof by the abstraction of the minerals near to and underneath the canal.

This claim, therefore, of the plaintiffs fails, and they are not entitled upon this ground to have it adjudged that any minerals should be left unworked or that they should be compensated therefor.

As to their other claim, viz., the apprehended action, Mr. Gully found that, although the continued working of the minerals would cause some surface damage to the banks, tow-path, and possibly to some bridges of the canal, such damage would not interfere with the navigation of the canal, and that all that would be necessitated would be some repairs from time to time during a period of from eight to ten years to make good this surface damage at a cost not exceeding in all 1200*l*. He has however awarded, and the Divisional Court has upheld him, holding that, although this comparatively small amount of damage and outlay will be sustained and incurred, yet the mine-owners (the plaintiffs) were entitled under the Act to have it declared that they were to have their coal left unworked, and he has defined the extent, and awarded that the canal company are to pay to the plaintiffs for the coal the sum of 12,688*l*. The result is singular, for the canal company does not ask that the

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coal should be left, and they are willing that every ton of it should be worked and taken away by the plaintiffs in the same way as if no canal existed; and yet this coal is for ever to be made useless to mankind, although neither the canal company nor the mine-owners require it for the safety of their respective undertakings.

The question, therefore, is, Do these two sections, coupled with the decision in *Knowles* v. *Lancashire and Yorkshire Ry. Co.* (1), necessitate under the circumstances of this case that it should be held that coal at the instance of the mine-owner shall be left and be paid for amounting, as it happens to do in this case, to the money value of 12,688*l.*, when 1200*l.* spread over eight to ten years is the utmost money necessary to be expended to keep things as they are? It will be seen that the only injury which can befall the plaintiffs is the before-mentioned surface damage which might give rise to an action by the canal company, and which action the canal company, who are the only persons who could bring it, are willing to covenant never shall be brought against the mine-owner.

What then, in these circumstances, is left to the plaintiffs as regards their two rights under the sections? It appears to me, nothing.

If they had been liable to have had their mine injured or been liable to an action by the canal company, that case would not have been this case; but, as they are liable to neither and will not sustain a shilling's worth of injury, I do not see that a declaration can properly be made, as has been made, that 12,688*l.* of coal should be left and paid for by the canal company to the mine-owner.

Lord Cottenham, in his judgment in *Cromford Canal Co.* v. *Cutts* (2), which judgment was stated by Lord Macnaghten in the House of Lords to be clearly right, in dealing with these claims under similar sections, said: "There might be a case where no damage to the owner (i.e., coal-owner) would accrue. If the coal-owner's power and control over his mine be not interfered with by the rights vested in the company (i.e., canal company) then

(1) 14 App. Cas. 248. (2) 5 Rail. Cas. 442.

it will not be necessary to put in operation the machinery of the Act if the damages be merely imaginary." In this I entirely agree; and what difference is there between imaginary damages and those as to which the canal proprietor undertakes and binds himself never to put forward a claim?

But it was argued for the plaintiffs that besides the canal proprietor and the mine-owner the public have rights, and that the mine-owner under the section owed a statutory duty to them in addition to the canal proprietor, which the Attorney General could enforce by information, and, consequently, that this Court could not sanction an undertaking which might render it unnecessary to leave unworked the 12,688*l.* worth of minerals as directed by the arbitrator. It appears to me, however, that Mr. Gully's finding has rendered this point, which is taken by the plaintiffs in the exigencies of their position, untenable. He finds that, although there will be the surface damage mentioned caused by a subsidence, "such subsidence would not interfere with the navigation of the canal"; so the Attorney General on behalf of the public would have no cause of complaint.

Had the canal-owners offered the undertaking which they did on January 24, 1893, before action brought, I should have said, for the reasons above, that the plaintiffs' action had failed and should have been dismissed with costs. But, upon the facts which existed according to Mr. Gully's finding as to the subsidence, when the action was brought on March 18, 1891, the plaintiffs were within their rights in bringing it, and, in my opinion, continued so until January 24, 1893, when the undertaking was offered by the defendants, and which upon the facts as found should have been accepted by the plaintiffs.

Sir Henry James before us, for the canal company, repeated this offer, and if required consented to bring the 1200*l.* into Court, so that it might be there when required from time to time for the surface repairs. In my judgment, the Court may well sanction this consent being given, and we think that this undertaking should be given. In these circumstances, in my judgment, the plaintiffs being under no fear of an action, the second point also fails the plaintiffs, and this appeal must be allowed, and the award of Mr. Gully and the judgment of the Divisional Court

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ordering the coal to be left and 12,688*l.* to be paid must be set aside. Lord Justice Kay has stated the way in which costs are to be dealt with, and I agree as to this.

Appeal allowed.

Solicitors for plaintiffs: *Woodcock, Ryland, & Parker, for Tweedale, Sons, & Lees, Oldham.*

Solicitors for defendants: *Norris, Allens, & Chapman, for G. Jackson, Rochdale.*

E. L.

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[IN THE COURT OF APPEAL.]

WARREN *v.* MURRAY AND ANOTHER.

Limitations, Statute of—Agreement for Lease, possession under—Time from which Period of Limitation runs—Equitable Right to Lease—Right of Recovery at Common Law defeated by Equity—Implied Trust—Real Property Limitation Act, 1833 (3 *&* 4 *Wm.* 4, *c.* 27), *ss.* 2, 7—*Real Property Limitation Act,* 1874 (37 *&* 38 *Vict. c.* 57), *ss.* 1, 9.

Under an agreement by the owners of land to grant leases of houses, when erected on such land by the intended lessees, the latter became entitled to a lease of two of such houses at a peppercorn rent for a term of years. No lease of these houses was ever granted, but the intended lessees and their successors in title continued in possession during the term of years under such circumstances that a Court of Equity, if applied to, would have decreed specific performance of the agreement for a lease:—

Held, that during such term of years the Statute of Limitations did not begin to run against the owners of the land, inasmuch as they had not an effective right of entry or action for the recovery of the land.

By Kay, L.J., an intended lessee so let into possession is a cestui que trust within the meaning of the proviso to s. 7 of the Real Property Limitation Act, 1833, and, therefore, the operative part of the section does not apply to his case.

Drummond v. *Sant* (Law Rep. 6 Q. B. 763) approved of.

APPEAL from the judgment of Wills, J., at the trial without a jury.

The action was brought for trespass to and to recover possession of two houses in Camden Town.

The facts were as follows. An agreement under seal was made on June 2, 1790, between the trustees of the Marquis of Camden's estates and Messrs. Kirkman & Hendy, the plaintiff's predecessors in title, the effect of which, so far as material, was in substance

as follows: after reciting that Messrs. Kirkman & Hendy had proposed to take and build on certain land, forming part of the Camden estates (which included the site of the houses in question), it was thereby agreed that Messrs. Kirkman & Hendy would within three years from Michaelmas, 1790, build on such land in manner following—that is to say, they would in the first of such years build so many good and substantial messuages or tenements and buildings as should be of the clear annual rent or value of 200*l.*, and in the next two years they would lay out so much money in building on such land so many other good and substantial messuages or tenements and buildings as would, with the money to be expended in building in the first year, amount to 50,000*l.*, and that they would pay for the said land the annual rents thereinafter mentioned; and the trustees agreed that, as soon as Messrs. Kirkman & Hendy should have erected so many good and substantial messuages or tenements and buildings as should be of the clear annual rent or value of 200*l.*, they would grant to them or their nominees one or more leases of such messuages or tenements and buildings, and also of all those which afterwards during the said three years should be erected and built on the land, as the same should be erected, for the term of ninety-nine years from Michaelmas, 1790, at the yearly rent of a peppercorn for the first three years of the said term, and for the residue thereof at the yearly rent of 25*l.* per acre, after deducting so much land as should be appropriated for certain streets proposed to be formed thereon by the buildings aforesaid, such rent to be divided and apportioned so that not more than one sixth part of the annual value of each house should be charged thereon as a ground-rent for the same. Messrs. Kirkman & Hendy were let into possession of the land, and proceeded to build thereon in pursuance of the agreement.

The full amount of the rents, which were by the agreement to be secured to the trustees, having been reserved by leases of other houses granted thereunder, Messrs. Kirkman & Hendy or their assigns became entitled to a lease or leases of the two houses in question for the term of ninety-nine years from Michaelmas, 1790, at a peppercorn rent, but no lease of such houses was ever asked for or granted. The interest of Messrs. Kirkman & Hendy

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in a portion of the land mentioned in the agreement, which included the sites of the houses in question, became vested by assignment in John Warren, the plaintiff's father and predecessor in title. The possession of the premises by the plaintiff's predecessors in title, and subsequently by the plaintiff, continued till January, 1891, when the defendants, as trustees of the Camden estate, entered and took possession of the houses. No rent was ever paid in respect of them. The plaintiff contended that, at the date of the entry by the defendants, their title was barred and he had a title by virtue of the Statute of Limitations.

The learned judge gave judgment for the defendants.

J. G. Joseph, for the plaintiff. A person let into possession of land under an agreement such as that of June 2, 1790, has been held to be a tenant at will: *Camden* v. *Batterbury*. (1) The plaintiff's predecessors were therefore tenants at will. That tenancy must be taken to have determined under s. 7 of the Real Property Limitation Act, 1833, at the expiration of a year from their entry. As their possession was not adverse at the time of the passing of the Act, the case falls within s. 15, and the trustees would have five years from the date of the Act within which to recover the land. At the expiration of that period their title was barred.

[KAY, L.J. The trustees could not in fact have recovered the land during the time when the statute is alleged to have been running, because they would have been at once restrained by a Court of Equity.]

The trustees might and ought to have compelled the tenants to take a lease during the twenty years, and, not having done so, they are barred.

[KAY, L.J. Could not the tenants have enforced the execution of a lease at any time within the ninety-nine years? And, if so, must not the landlords have a corresponding right? The rent being only a peppercorn rent, the delay would not constitute laches so as to destroy the right to specific performance.]

It is submitted that after twenty years the tenants could elect either to require a lease or to allege that the statute had

(1) 5 C. B. (N.S.) 808; 7 C. B. (N.S.) 864.

run. The trustees knowing of the statute ought, within the five years after its passing, to have required the tenants to take a lease or have ejected them. They had a right to recover the land at common law. The Statute of Limitations deals with the legal right of action.

[KAY, L.J. Does s. 7 apply at all to the case of a tenant in possession under such an agreement as this, who is entitled in equity to a lease?]

It has been held that the proviso to the section, which provides that a cestui que trust shall not be deemed to be a tenant at will to his trustee, only applies to express trusts: *Sands* to *Thompson* (1); *Doe* v. *Rock.* (2) The expression of opinion to the contrary in *Drummond* v. *Sant* (3) was obiter only, being unnecessary for the determination of the case. That was not really the case of a tenancy at will, the respective interests of the parties depending upon the construction of a private Act. The agreement of 1790 created no trust either express or implied. [He also cited *Garrard* v. *Tuck* (4); *Soar* v. *Ashwell.* (5)]

J. F. P. Rawlinson (*Sir R. E. Webster, Q.C.*, with him), for the defendants, was not called upon.

LORD ESHER, M.R. In my opinion this appeal fails. I think the result of the judgment in *Drummond* v. *Sant* (3) is that, in considering the effect of the Statute of Limitations as applied to a case such as this, the Court must consider what are the actual legal rights of the parties, meaning thereby their equitable as well as their common law rights; and, therefore, if the parties, against whom the Statute of Limitations is vouched, were according to law, including equity as well as common law, unable to recover the land in question, the Statute of Limitations would not apply. That seems to me to be a just and sensible view, and I do not wonder that it commended itself to a Court composed of such eminent judges as those who decided that case. This Court is not, strictly speaking, bound by their decision; but, accepting as we do the law there laid down as being what we

(1) 22 Ch. D. 614.
(2) 4 M. & G. 30.
(3) Law Rep. 6 Q. B. 763.
(4) 8 C. B. 231.
(5) [1893] 2 Q. B. 390.

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should desire to lay down, if the point arose before us for the first time, we have to apply that decision to the present case. The rights of the parties in this case must be determined by the agreement of June 2, 1790, and the first thing therefore which we have to do is to consider the effect of that agreement. By its terms the trustees of the Marquis of Camden agreed that the predecessors in title of the plaintiff should, if they performed their part under it, remain in possession of the lands included in it for the period of ninety-nine years. If they had failed to perform their part, and had committed such a breach of the agreement as would entitle the trustees to put an end to the agreement, that would have altered the whole state of the case; but if they performed their obligations under the agreement, the trustees were not entitled to interfere with their right of possession for ninety-nine years. If what I have before said is true, it is immaterial what in a Court of Common Law, which could take no cognizance of equitable rights, the formal judgment in an action would be. If under the state of things that existed before the Judicature Acts a Court of Common Law, being prevented from taking any notice of equitable rights, would be bound to say that the trustees had a right to possession, but the next day their opponents could go into a Court of Equity and get a judgment the other way, the decision of the Court of Common Law would not be the substantial decision of law in the case. The substantial decision of law would be that of the Court of Equity. Now common law and equity are both to be administered by the same Court. Therefore, although the Court should come to the conclusion under such circumstances that at common law the trustees would have had a right to possession of the premises, it would not be bound to give judgment to that effect, if it saw that there was an equitable right to prevent that common law right from being enforced. Using the word "legal" in the sense I have explained, the question is whether the trustees had under this agreement a legal right to enter or recover the premises in the circumstances which happened. Looking at the agreement, it seems to me clear that, although at common law they might say that the tenants were mere tenants at will, yet according to the law as a

whole, including the equity doctrines applicable to this case, they could not exercise their will and re-enter, because, if the tenants had performed their obligations under the agreement, a Court of Equity would at once interfere by injunction to prevent their being dispossessed, and would compel specific performance of the agreement. The trustees could, I think, have called upon the tenants at any time during the ninety-nine years to take a lease of these houses, though under the circumstances I do not see that a lease would have been of much use to the trustees. Again, the tenants, in whose case there might be more reason for insisting on the execution of a lease, would have had a right to call upon the trustees to grant a lease. That appears to me to be a test by which to determine the real question, which is, whether by the law as applied to the agreement of 1790 the trustees could at any time before the end of the period of ninety-nine years have entered upon the premises in question and dispossessed the tenants. It seems to me clear that they could not according to law, including in that term equity, and therefore no part of the Statute of Limitations applies to the case. If it were necessary to construe the 7th section, I should say that it applies to tenancies at will pure and simple, where there is no clog or difficulty such as arises out of an agreement like that in question here. If the result of that is that the case is thrown back upon the 2nd section, or the substituted provision of the Real Property Limitation Act, 1874, I should say that, according to the true meaning of that section, the trustees had no right of entry or action in this case. My judgment is that, where by the law, taking it as a whole including equity, the person, against whom the Statute of Limitations is vouched, could not recover the land in question, the statute does not apply. I think, therefore, that the judgment of Wills, J., which was founded upon and followed the decision in *Drummond* v. *Sant* (1)—a decision, as it appears to me, of excellent good sense—is correct, and this appeal must be dismissed.

KAY, L.J. I agree. In this case the trustees of the Marquis of Camden in 1790 entered into an agreement under seal with

(1) Law Rep. 6 Q. B. 763.

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certain persons, who were intending lessees, to the effect that they would grant leases when certain buildings were erected; and that, when by leases of buildings so erected a certain amount of rent had been secured, leases of the rest of the land should be at peppercorn rents. The leases so to be granted were for the term of ninety-nine years. The intending lessees entered into possession of the land, and built thereon buildings of sufficient value to secure the stipulated amount of rent. In respect of portions of the land leases were granted, but in respect of the remainder no leases were ever granted, but the tenants remained in possession of that land, having been let into possession under the agreement, without any legal lease. Ninety-nine years expired, and the trustees then entered and took possession of the land as though upon the expiration of a lease. This action was then brought by the plaintiff against the trustees on the ground that the tenants who were in possession of the lands, of which no leases had been granted, had acquired a fee simple by reason of the Statute of Limitations. It was said that, having paid no rent and made no acknowledgment of the trustees' title, they must be considered as having been tenants at will, and consequently, under s. 7 of the Real Property Limitation Act, 1833, the title of the defendants was barred, and they had become owners in fee. The question really comes to this: What is the position of a person who, having entered under an agreement such as this, has performed his part of such agreement, and remains in possession of the land, without requiring any lease to be granted to him, or having any requisition made upon him to take a lease? It was argued that his legal relation to the owner, by whom he had been let into possession, was that of tenant at will. As at present advised, I think that to be the case, and I will assume it to be so. But does it follow that the Statute of Limitations confers on a tenant at will, who remains in possession under such an agreement as this, a title in fee simple? The argument for the plaintiff was based upon s. 7, which provides that "when any person shall be in the possession, or in receipt of the profits of any land, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or bring an action to

recover such land shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined." Pausing for a moment at that point in the section, the contention is that the tenancy in this case must be deemed to have determined one year after the entry of the plaintiff's predecessors, and therefore at that period the statute commenced to run. But is that so? The counsel for the plaintiff was bound to admit that, if within twenty years after 1790 an action had been brought against the tenants to eject them, the action could have been immediately stopped by an application to the Court of Chancery, claiming an injunction and specific performance. If that be so, can it have been intended by the section that the period of limitation should begin to run, so as to vest in the tenants the legal fee, at a time when any attempt at entry by the landlords could be immediately stopped by a Court of Equity? Then, was the effect of the delay in requiring a lease of the premises to be executed under the circumstances such that, if no lease were required for twenty years, the right to enforce the execution of a lease was gone. Why should that be so? The agreement does not specify any time within which the lease is to be executed; and, if at any time during the ninety-nine years, the tenants having fulfilled the whole of their part of the agreement, the trustees said they would treat them as tenants at will and turn them out, I have no doubt they could have been stopped before the Judicature Act by a suit in equity, or since that Act by a counter-claim in an action for the recovery of the land. That being so, the trustees could not at any time during the ninety-nine years have turned the tenants under the agreement, who had fulfilled their obligations, out of possession, although there was no lease of the premises. If the trustees could not have turned the tenants out, and the tenants had a right to specific performance, there must be a correlative right on the part of the trustees. If the trustees could not assert a legal right against the tenants, it seems impossible to suppose that the statute was running so as to confer a title upon them. This seems to me a complete answer to the plaintiff's contention.

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But I go further than that. The case of *Drummond* v. *Sant* (1) has decided that this very case is provided for by the proviso to s. 7, and that that section requires the Court in such cases to have regard, not merely to the legal rights of the parties, but also to any equity which may arise under such an agreement as that in the present case. The proviso is as follows: "Provided always that no mortgagor or cestui que trust shall be deemed to be a tenant at will within the meaning of this clause to his mortgagee or trustee." What is the relation between a mortgagor and mortgagee? Clearly there is no express trust created by that relation. For many purposes there is no trust at all, and at most there is only an implied trust. By analogy, what is the meaning of "cestui que trust" in the other branch of the proviso? Does it include a person who by the terms of an agreement is placed in a position which equity regards as that of a cestui que trust? If it does, then the present case appears not to be within the section at all, because there is in this agreement that which by the doctrine of equity constitutes a fiduciary relation between the parties. I take the following passage from Lewin on Trusts, 9th ed., p. 148: "Again, if a person contract to sell another an estate, the vendor has impliedly declared himself a trustee in fee for the purchaser, and is accountable to him for the rents and profits." Now, a person who has agreed to lease is pro tanto a vendor, and the same law applies between him and his intended lessee as between a vendor and purchaser. So, when an intending lessor has let the intended lessee into possession under such an agreement as this, there is an implied trust which makes the intended lessee a cestui que trust of the lessor. If this proviso includes the case of an implied trust, then the case is taken out of the section altogether. I think that the section was not intended to apply to the case of a tenant at will, who is in the position of a cestui que trust to his landlord. I understand the result of the judgment in *Drummond* v. *Sant* (1) to be what I have been endeavouring to express. It was argued that that case was not altogether consistent with the decision of Fry, J., in *Sands* to *Thompson*. (2) In that case there was a mortgage which had been

(1) Law Rep. 6 Q. B. 763. (2) 22 Ch. D. 614.

paid off, but the legal estate remained vested in the mortgagee, there having been no reconveyance. The mortgagor having been in possession for more than thirteen years after the payment of the mortgage debt, on a sale of the estate it was contended by the purchaser, upon a summons taken out under the Vendor and Purchaser Act, 1874, that the fact that the legal estate was outstanding in the mortgagee was a defect in the title. There is an obvious difference between that case and the present. There the mortgagee, who was not in possession, had no equity against the mortgagor, who continued in possession. He could not have claimed in equity a right to the possession. If the mortgagee had brought ejectment against the mortgagor, the latter could have counter-claimed a reconveyance, and his counter-claim must have been successful. That is a wholly different case from the present. Here the tenants were rightfully in possession both in law and equity, while they were in possession, and when the trustees recovered possession they rightfully recovered it. Law and equity were both in their favour. That case is wholly different from a case where one party had equity, and the other law, in his favour. It has been pointed out that the language used in that case by the learned judge may be read as meaning that the proviso to s. 7 only applies to an express trust. If he really meant to decide that—which I doubt—the case appears to me to be inconsistent with the decision in *Drummond* v. *Sant* (1), which I think clearly decides the exact contrary, viz., that the proviso to s. 7 includes implied trusts. Independently of that decision, I should myself have come to the same conclusion, because I find that in s. 25 of the Act the term "express trust" is used. I therefore think that the judgment of Fry, J., ought not to be read as in conflict with the judgment in *Drummond* v. *Sant* (1); but if the two cannot be reconciled, then I should prefer the decision in the last-mentioned case. I think that this case is within the proviso to s. 7 and therefore is excluded from the operative part of the section. For these reasons I think that the Statute of Limitations has not run against the defendants, and the judgment of Wills, J., was correct.

(1) Law Rep. 6 Q. B. 763.

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A. L. SMITH, L.J. The question to be determined is, at what date the Statute of Limitations began to run against the defendants. The plaintiff says that it began to run at the expiration of a year from the entry of his predecessors in title on the lands in question, under the building agreement of 1790, and that by virtue of s. 15 of the Act the title of the trustees was barred at the expiration of five years from the date of the Act. The defendants contend the contrary. In June, 1790, the trustees of the Marquis of Camden let certain builders into possession of thirty acres of land on the terms that they were to erect buildings thereon to the value of 50,000*l.*, and that leases for ninety-nine years were to be granted upon houses being erected, so as to command annual rents amounting to 200*l.* It seems to me impossible to suggest, under these circumstances, that at any time during those ninety-nine years the trustees could have turned the builders or their representatives out of possession of these premises, unless they had broken the covenants of the building agreement, which they did not, even although no leases had been granted; because, if any proceeding had been taken at law to turn them out, they could immediately have gone to the Court of Chancery and enforced specific performance of the agreement and obtained leases. If a lease of these houses had been granted under the agreement, it would have come to an end about 1889. In 1891 the trustees entered and took possession of the premises. The plaintiff now says they were not entitled to do so, because, no lease having been granted, a title has been conferred upon him and his predecessors by possession under the Statute of Limitations. I am clearly of opinion that this contention cannot be maintained. By the 2nd section of the statute it is provided that "no person shall make an entry or bring an action to recover any land but within twenty (now twelve) years next after the time at which the right to make such entry or to bring such action shall have first accrued" to the person making or bringing the same, or some person through whom he claims. It seems to me evident that a person must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. If the argument for the plaintiff is correct, the trustees are to lose their property because they

did not enter at a time when they really could not enter with any effect, inasmuch as a Court of Equity would at once have decreed specific performance and put an end to any entry they might have made. It seems to me impossible to hold that this constitutes an entry within the meaning of the Act. It is however said that the plaintiff's predecessors became tenants at will, and by virtue of s. 7 the statute began to run a year after they were let into possession. I do not so read the section. As in the case of s. 2, it seems to me that s. 7 requires that there should have been an effective right of entry or action before the section can apply at all. It provides at what time the right of entry or action shall be deemed to have accrued, but that assumes that there is a "right" of entry or action. In this case there was no such right, and therefore the statute did not run. It did not begin to run as long as the tenants were entitled to call for a lease, because during that period the trustees could not make an effective entry, or bring an effective action. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Wood, Bird, & Wood.*
Solicitors for defendants: *Farrer & Co.*

E. L.

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May 22, 23; June 6.

SCHOLFIELD v. THE EARL OF LONDESBOROUGH.

Bill of Exchange—Alteration—Stamp Sufficient to Cover Amount of Bill after Alteration—Negligence—Estoppel.

A bill of exchange for 500*l.* was after acceptance fraudulently altered by the drawer into a bill for 3500*l.* The stamp upon which the bill was drawn was sufficient to cover the larger amount; but the bill, when accepted, was not in other respects so drawn as to make its acceptance in that form a negligent act on the part of the acceptor. In an action against the acceptor by a bonâ fide holder for value:—

Held, that the mere fact that the defendant accepted the bill drawn on a stamp of a higher value than it need have borne was not evidence of such negligence on his part as to estop him from setting up the subsequent alteration of the bill as a defence to the action:

Held, further, that the bill did not by reason of the alteration become a new bill requiring a fresh stamp.

ACTION tried before Charles, J., without a jury. The facts were shortly as follows.

On September 8, 1890, the defendant accepted a bill of exchange for 500*l.* drawn by one Scott Sanders, payable to the drawer or his order, and bearing a 2*l.* stamp, which was an amount sufficient to cover a sum of 4000*l.* Before indorsement the bill was fraudulently altered by the drawer into one for 3500*l.* The plaintiff, a bonâ fide holder for value, was now suing the defendant upon the altered bill to recover the larger amount. The facts relating to the state of the bill when presented for acceptance are dealt with at length in the judgment, from which it will be seen that the learned judge found that although the bill was originally so drawn as to make the alteration possible, the defendant was not (apart from the question of the value of the stamp) guilty of such negligence in accepting it in the shape in which it then was as to estop him from setting up the defence that the bill had been fraudulently altered after acceptance.

Finlay, Q.C., and *E. Morten*, for the plaintiff. First, the negligence of the defendant in accepting the bill in the shape in which it was drawn was the proximate cause of the loss, and was such as to estop him from setting up the alteration of the bill as a defence to an action by a bonâ fide holder for value. Secondly,

the defendant in accepting a bill for 500*l.* upon a stamp sufficient to cover 4000*l.* was guilty of such negligence as to estop him from setting up the alteration. Thirdly, even if the plaintiff cannot recover the larger amount, the alteration is not apparent, and the plaintiff, being a holder in due course, is entitled under the proviso in s. 64, sub-s. 1 of the Bills of Exchange Act, 1882 (1), to recover 500*l.*, the amount for which the bill was originally drawn.

[They cited the following cases upon the first point: *Young* v. *Grote* (2); *Robarts* v. *Tucker* (3); *Bank of Ireland* v. *Trustees of Evans' Charity* (4); *Mayor, &c., of Staple of England* v. *Bank of England* (5); *Baxendale* v. *Bennett* (6); *Ingham* v. *Primrose* (7); *Swan* v. *North British Australasian Co.* (8); *Halifax Union* v. *Wheelwright* (9); *Carr* v. *London and North Western Ry. Co.* (10); *Arnold* v. *Cheque Bank.* (11)]

Jelf, Q.C., A. T. Lawrence, and *C. K. Francis,* for the defendant. First, the defendant is not estopped from setting up the alteration of the bill by reason of any negligence in accepting the bill, either with regard to the way in which it was drawn or to the fact that it was drawn on a stamp of unnecessarily high value. Secondly, the alteration of the bill was apparent, and the plaintiff cannot have the benefit of the proviso in s. 64. Thirdly, to satisfy the requirements of the Stamp Act, 1891, every instrument must be separately stamped; the acceptance of the bill as originally drawn exhausted the stamp on which it was drawn; the bill after alteration became a different bill or instrument

(1) By 45 & 46 Vict. c. 61, s. 64, sub-s. 1, "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers. Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour."

(2) 4 Bing. 253.

(3) 16 Q. B. 560.

(4) 5 H. L. C. 389.

(5) 21 Q. B. D. 160.

(6) 3 Q. B. D. 525.

(7) 7 C. B. (N.S.) 82; 28 L. J. (C.P.) 294.

(8) 7 H. & N. 603; 2 H. & C. 175.

(9) Law Rep. 10 Ex. 183.

(10) Law Rep. 10 C. P. 307.

(11) 1 C. P. D. 578.

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from that which the defendant accepted; it is, therefore, wholly unstamped, and by s. 38 of the Stamp Act, 1891, the plaintiff cannot recover upon a bill not duly stamped. [Upon the last point they referred to Byles on Bills, 15th ed., p. 339.]

Cur. adv. vult.

June 6. CHARLES, J., read the following judgment. In this case the plaintiff sought to recover from the defendant 3500*l.* on a bill of exchange drawn by one Francis Charles Scott Sanders upon and accepted by the defendant. The plaintiff was admitted to be a holder in good faith and for value of the bill. It was further admitted that when the defendant accepted the bill it was a bill for 500*l.* only, and that afterwards before indorsement it had been fraudulently altered by the drawer into a bill for 3500*l.* The defendant pleaded this alteration as a defence to the whole action, but in the alternative, whilst denying all liability, paid 500*l.* into Court. The plaintiff replied that the defendant "ought not to be admitted to say that the bill was altered in material particulars and thereby made void, because such alterations were made easy and every opportunity for them was given by the culpable negligence of the defendant in accepting the bill in the form in which he accepted it and on the bill stamp on which it was drawn, and without the said negligence the alterations would not and could not have been made." The bill was dated London, September 8, 1890, and bore a stamp of an amount sufficient to cover a sum of 4000*l.* In the left-hand corner were at the time of the acceptance the figures 500 preceded by the sign for pounds (£). Between the "£," however, and the figures was a space sufficiently wide to admit of another figure being interpolated. The "5" was made in a bold hand, and was somewhat larger than the two ciphers which followed it. The body of the bill was in three lines. On the first were the words "Three months after date." On the second were the words "Pay to me or my order the sum of," and on the third were the words "Five hundred pounds for value received." After the word "of" in the second line there was sufficient space left for the addition of another word; and before the word "Five" in the third line

there was also space for the addition of a word, without carrying the third line further to the left than the word "pay" in the second. Sanders, having obtained the defendant's acceptance to the bill so drawn, inserted the figure 3 between the sign for pounds and the figures 500, and in the body of the document added the words three thousand between the word "of" on the second line and the words "Five hundred" on the third, writing the word "three" on the second line and the "thousand" on the third, and in this shape negotiated it.

It was contended that, under these circumstances, the defendant was liable for the whole amount of the fraudulently altered bill, upon the principle of the case of *Young* v. *Grote*. (1) There the plaintiff delivered some printed cheques to his wife signed by himself but with blanks for the sums, requesting her to fill the blanks up according to the exigency of business. She permitted one to be filled up with the words "fifty pounds, two shillings," the "fifty" being commenced by a small letter and placed in the middle of a line. The figures 50 : 2 were placed at a considerable distance from the printed £. In this state she gave the cheque to her husband's clerk to receive the amount, whereupon he inserted the words "Three hundred and" before the word "fifty," and the figure 3 between the £ and the 50. The banker having paid the cheque in the usual course of business it was held that the loss must fall on the plaintiff, on the ground that the customer had misled the banker by want of proper caution in drawing the cheque in a manner which admitted of easy interpolation. It was suggested by Brett, L.J., in *Baxendale* v. *Bennett* (2), that the authority of this case has been shaken by the decision of the House of Lords in the *Bank of Ireland* v. *Evans' Trustees* (3). Upon reference, however, to the opinion of the judges in that case, delivered by Parke, B., and adopted by the House of Lords, it will, I think, be found that *Young* v. *Grote* (1) was not in any way disapproved, and it has been recognized in many subsequent cases. "Its authority," says Williams, J., in *Ex parte Swan* (4), "cannot be disputed," although, as he points out, it may be doubtful whether the

(1) 4 Bing. 253.
(2) 3 Q. B. D. 525.
(3) 5 H. L. C. 389.
(4) 7 C. B. (N.S.) 400.

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liability of a man who signs a blank bill, or note, or cheque be founded on the doctrine of estoppel or on a rule of the law merchant that an actual authority is thereby conferred on the persons in whose hands the instrument is. In the *Bank of Ireland* v. *Evans' Trustees* (1) the Lord Chancellor speaks of the case as having proceeded on the ground of estoppel by reason of negligence, and Erle, C.J., takes the same view of it in *Ex parte Swan.* (2) So also does Blackburn, J., in his judgment in the Exchequer Chamber in *Swan* v. *North British Australasian Co.* (3)

It appears clear from these cases that a person who signs a negotiable instrument with the intention that it shall be delivered to a series of holders does incur a duty to those who take the bill, note, or cheque, not to be guilty of negligence with reference to the form of the instrument. If he signs it in blank, he is responsible for any amount the stamps will cover. If he signs it negligently in such a shape as to render alteration a likely result, he is responsible on the altered instrument.

I go on then to inquire whether the defendant in this case was guilty of that sort of negligence, in accepting this bill in the form in which it originally was, which imposes on him a liability for the subsequent forgery. This is a question not of law but of fact, and in the various authorities has always been so dealt with (see especially on this point, *Société Générale* v. *Metropolitan Bank.* (4)) Now, it must not be forgotten that when the defendant gave this acceptance, he had not the slightest reason to distrust the honesty of the drawer, or to suppose him likely to be guilty of a criminal act. The negligence charged has no reference to the character of the person in whose hands the defendant placed the bill, but rests entirely on its form. And, first, it was said the defendant ought not to have accepted a bill for only 500*l.* on paper bearing a stamp large enough to cover 4000*l.* But I think it would be pressing the rule of estoppel by negligence far beyond what is justifiable to hold that the mere fact that the document bore a higher stamp than it need have done estops the defendant from setting up the subsequent forgery. He did not, it must be remembered, sign the bill in

(1) 5 H. L. C. 389.
(2) 7 C. B. (N.S.) 400.
(3) 2 H. & C. 175.
(4) 27 L. T. (N.S.) 849.

blank. It was complete when he signed it, and there was nothing whatever to draw his attention to the amount of the stamp; and he was not, as far as I can see, guilty of any breach of duty in failing closely to scrutinize it.

Next, the manner in which the words and figures in the body of the bill were written was relied on, and, no doubt, the bill was drawn in such a shape as to make an alteration possible without its being easily discoverable. But I do not think this is sufficient to impose liability on the defendant. It is not enough that he accepted a bill in a form facilitating forgery; he must negligently so accept it, and if when he accepts it—although a forger can, owing to the arrangement of the words and figures in fact alter it without detection—it appears to be in ordinary form, he is not, in my opinion, liable.

In *Young* v. *Grote* (1), the arbitrator who stated the special case, found that the cheque had been filled up in a grossly negligent manner, with the acquiescence of the plaintiff's agent. A glance at it would have satisfied any careful person that it was incomplete; that it was in a state in which alterations might reasonably be contemplated; in other words, in which alteration was not merely a possible but a likely result. Here I cannot see anything to warrant such a finding. The unaltered bill was complete in form, and, upon inspection, would not, in my judgment, have excited suspicion in the mind of a reasonably prudent man.

The defendant, therefore, is not, in my opinion, liable to pay the altered bill. The question remains whether, having regard to the new law contained in the proviso to sub-s. 1 of s. 64 of the Bills of Exchange Act, 1882, he is liable to the extent of 500*l*. That sub-section enacts that "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers; provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment

(1) 4 Bing. 253.

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of it according to its original tenour." Now, in the present case, I do not think the alteration was "apparent." It is not disputed that the plaintiff is a holder in due course, and although a careful scrutiny of it might have led to the conclusion that the "3" had been interpolated, and the "Three thousand" added, the alteration is so skilfully effected as not to be at all likely to attract attention. Unless, then, there is any stamp objection, payment of it can be enforced for 500*l.* It is, however, contended that the bill, as altered, became a new instrument requiring a fresh stamp. The answer to this argument is, that Sanders had altered the bill before it was delivered to any holder for value. He himself had not given value. The defendant accepted the bill for his accommodation. It had not, therefore, for stamp purposes been "issued" when it was altered, and an alteration before issue does not avoid the bill: *Downes* v. *Richardson.* (1)

The definition of "issue" in s. 2 of the Act of 1882, as "the first delivery of a bill or note complete in form to a person who takes it as a holder," does not, in my opinion, alter the law as to what, for the purposes of the stamp laws, constitutes the issue of a bill.

In the result, I hold for the reasons I have given that the defendant is liable to pay the plaintiff 500*l.*, and no more; and as he has paid that sum into Court, my judgment must be for him and with costs.

Judgment for defendant.

Solicitors for plaintiff: *Smith, Fawdon, & Low.*

Solicitors for defendant: *Saltwell, Tryon, & Saltwell.*

(1) 5 B. & A. 674.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1894
March 16.

ECKERSLEY AND OTHERS *v.* THE MERSEY DOCKS AND HARBOUR BOARD.

Arbitration—Arbitrator—Agreement to refer to Named Arbitrator—Disqualification—Probable Bias—Staying Proceedings.

The rule which applies to a judge or other person holding judicial office—namely, that he ought not to hear cases in which he might be suspected of a bias in favour of one of the parties—does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the Court in saying that such an arbitrator is disqualified from acting, circumstances must be shewn to exist which establish, at least, a probability that he will in fact be biassed in favour of one of the parties in giving his decision.

Where, however, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employers in respect of the carrying out of the contract.

Nuttall v. *Mayor of Manchester* (8 Times L. R. 513) commented on.

APPEAL from the decision of the Queen's Bench Division, staying the proceedings in an action.

The plaintiffs, a firm of contractors, entered into a contract with the defendants, the Mersey Docks and Harbour Board, to execute for them works of excavation on a piece of their land for the purpose of making a new dock.

By clause 53 of the contract, "all disputes and differences of every kind which may arise between the contractors and the board during the progress or after the completion of the works contracted for, in relation to or arising out of any of the plans or drawings, or any of the provisions of the specification or the contract, or in relation to any of the works, or the payment to be made for the same, or as to the accounts between the board and the contractors, shall be and the same are hereby referred to the engineer of the board as sole arbitrator, with power to make awards from time to time as he may think proper, and with power to make such orders in any such award as to the costs and charges of and attending any such reference, and of the award,

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as the said engineer shall in his discretion think proper, and every award of the engineer shall be finally binding and conclusive upon the parties in relation to the disputes and differences as to which such award is made, and shall not be disputed on any ground whatever."

By clause 45, if, in the opinion of the engineer, the contractors should fail to duly carry out and perform their contract, or to exercise due diligence, and make due progress with the works, the board were empowered to take the works out of their hands, and put an end to the contract. By clause 47, if the contractors should not proceed with the work, or any portion of it, to the engineer's satisfaction, either as regarded materials, plant, or workmen, or the manner in which the work was being done, or the despatch which was being made, or if for any other reason the engineer should be of opinion that it was expedient that any part or parts of the work should be done by the board and not by the contractor, then the board might, on giving notice signed by the engineer or their solicitor, proceed themselves to execute the works unperformed by the contractors, and recover the expenses which they might incur in or about the exercise of the powers given to them by this clause from the contractors, the amount of such expenses to be ascertained and fixed by the engineer.

During the progress of the works contracted to be done by the plaintiffs, the defendants commenced to execute other works in a dock called the "Canada Dock," which adjoined the piece of land upon which the works contracted to be done by the plaintiffs were being carried on. The works in the Canada Dock were executed under the superintendence of the engineer's son, who was acting as assistant engineer to his father, and owing, as the plaintiffs alleged, to his negligence or incompetence, water escaped from the Canada Dock, and flooded the works which the plaintiffs were executing under the contract. The plaintiffs brought their action against the defendants, claiming, in substance, damages by reason of having been delayed and impeded, through the negligent acts of the defendants in the Canada Dock, in the execution of the works under the contract. An application was thereupon made on behalf of

the defendants for a stay of proceedings, on the ground that the disputes between the parties were disputes which they had agreed, by clause 53 of the contract, to refer to arbitration. That application was resisted by the plaintiffs on the grounds, first, that the action was brought in respect of negligent acts committed independently of the contract, and not covered by clause 53 (1); and, secondly, that, even if the disputes were covered by clause 53, the action ought not to be stayed having regard to the probability of bias on the part of the engineer in favour of the defendants. The affidavits used in opposition to the defendants' application for a stay of proceedings suggested that the engineer's son hoped to succeed his father as engineer to the defendant board, and stated that the matter of the son's appointment had already been discussed at a meeting of the board, but that this was unknown to the plaintiffs when they entered into the contract.

A judge in chambers having ordered a stay of proceedings in the action, the Queen's Bench Division (Mathew and Cave, JJ.), affirmed his order.

The plaintiffs appealed.

Moulton, Q.C., and *J. A. Hamilton*, for the appellants. Under s. 4 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), the Court has a discretion to refuse to stay proceedings, if satisfied that there is sufficient reason why the matter should not be referred in accordance with the submission. The circumstances in the present case establish such a sufficient reason, because they establish a strong probability of bias in the mind of the engineer against the plaintiffs' claim. Conceding that he would not be biassed if he had to decide the question whether he had himself acted with due skill and competence, there is a strong probability that his mind will be biassed when he has to decide the question whether his son acted with due skill and

(1) It is thought unnecessary to report the case on the first point, because the decision of it depended altogether upon the effect of various clauses in the special contract between the parties. The Court of Appeal unanimously came to the conclusion that the questions raised in the action were disputes which ought to be referred to arbitration under the contract.

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competence. Regard must be had to the facts that the son hopes to succeed him as the engineer of the board, and that a decision to the effect that the son had not acted with due skill and competence would be likely to prejudice his chance of securing the appointment. The temptation to decide against the plaintiffs' claim would be extreme. The decision in *Nuttall* v. *Mayor of Manchester* (1) covers this case. In *Jackson* v. *Barry Ry. Co.* (2), A. L. Smith, L.J., said (at p. 243) that in *Nuttall* v. *Mayor of Manchester* (1) the Court thought "that the arbitrator would be judge in his own cause, and be deciding whether or not he had himself been guilty of professional negligence." This case is even stronger.

Sir R. Webster, Q.C. (*Bigham, Q.C., Carver,* and *Llewellyn Davies,* with him), for the respondents. The parties to the contract have agreed that the arbitrator shall decide disputes involving the question of his own skill and competence. Where that is the case, the parties cannot avoid a reference to the named arbitrator, unless it can be shewn either that he has prejudged the matter, or that he is not acting with bona fides: *Jackson* v. *Barry Ry. Co.* (2) The decision in *Nuttall* v. *Mayor of Manchester* (1) ought to be overruled if that case intended to decide that the mere fact of the arbitrator having to decide upon his own skill and competence was sufficient to disqualify him. Here there is no such probability of bias established by the facts stated on the plaintiffs' affidavits as should induce the Court to say that the engineer is disqualified from acting as arbitrator.

LORD ESHER, M.R. In this case it is said on behalf of the plaintiffs that there is sufficient reason for the Court to say that the disputes in the action should not be referred to the engineer of the board, because he might be biassed. It is not a sufficient reason to say that he might be biassed, if the Court should be of opinion that there is no ground for supposing that he would be biassed. When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biassed, although in

(1) 8 Times L. R. 513. (2) [1893] 1 Ch. 238.

truth he would not be biassed. It is an attempt to apply the doctrine which is applied to judges, not merely of the Superior Courts, but to all judges—that, not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biassed. Is that a rule which can be applied to such contracts as this, where, as between the contractor and his principal, both parties agree that the chief servant of one of them shall be the arbitrator? If it was not for the agreement of the parties—if the rule applicable to judges were to be applied—it is obvious that it would be impossible to say that the engineer, under whose superintendence the work has to be done, could act as arbitrator, because some persons would suspect him of being biassed in favour of the parties whose servant he was. But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected, shall be the arbitrator. A stronger case than that must, therefore, be shewn. It must, in my opinion, be shewn, if not that he would be biassed, that at least there is a probability that he would be biassed. That seems to me distinctly to have been decided in *Jackson* v. *Barry Ry. Co.* (1) The case relied on by the plaintiffs is *Nuttall* v. *Mayor of Manchester.* (2) That decision has been discussed, and, as I understand, it may be explained on the grounds that there was an unseemly personal dispute, raising a vindictive feeling between the engineer and contractor, and also that the engineer had expressed an opinion on the matter he had to decide so strongly as to amount to a prejudgment. If those were the grounds of the decision, the case is to be supported entirely; but it is not in point in the case before us, because the facts are quite different. If, however, the case decides, that the mere fact that the arbitrator will have to decide upon his own conduct is sufficient of itself to satisfy the Court that there is a good reason why the matter should not be referred to him, I think we ought not to agree with it. The decision, if that be the effect of it, seems to me absolutely contrary to *Jackson* v. *Barry Ry. Co.* (1) and

(1) [1893] 1 Ch. 238. (2) 8 Times L. R. 513.

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other cases, and we ought to overrule it. It must, therefore, be shewn in the present case that it is, at least, probable that the engineer would be biassed. Now, what is relied on by the plaintiffs in order to shew that? It seems to be admitted that, if the engineer had to consider whether he had himself given a negligent or unskilful or incompetent order, it could not be said that the Court would be justified in directing that the matter should not be referred to him; but the Court is asked to say that he should not be the arbitrator because the negligent, unskilful, or incompetent order was given by his son. That involves our saying that a man who, it is certain, would not be biassed in judging of his own acts, would probably be biassed to give a decision in favour of his son which he knew to be wrong. I cannot take that view of human nature. Where you have a man of high character, one whose character for impartiality cannot be impeached when he has to decide as to his own conduct, to say that such a man would not have enough honesty and strength of mind to act impartially where his son's conduct came in question is a statement which I cannot accept. I do not believe it in this particular case. I am of opinion that this appeal should be dismissed.

LOPES, L.J. I am of the same opinion.

It is said that, assuming the disputes between the parties are within clause 53 of the contract, the Court ought not to let those disputes go before the defendants' engineer as arbitrator, because from the nature of the disputes he is disqualified from acting as arbitrator. It is said that he will have to decide upon the professional competency, not of himself, but of his son, and that it would not be right and proper that he should do so, and be considered at the same time an impartial arbitrator. Now, it is to be observed that the rule to be applied to a case of this kind is entirely different to that which is applied to judges, magistrates, or any person in a judicial capacity, where the tribunal is not chosen by the parties who are sending their disputes to be settled by it, but is a tribunal constituted apart from any agreement or consent of the parties. Where the tribunal is not chosen by the parties, no doubt the rule is very strict. There is no principle

better recognised than that a man is not to be a judge in his own cause; and in the case of magistrates it is well established that, if there is any reason which, it can be suggested, would influence the minds of ordinary persons, and induce them to think that the magistrates might be biassed, that will be sufficient to render the tribunal incompetent. But where the parties choose their own tribunal the case is very different. In the present case it is of the essence of the submission that questions shall be submitted to the engineer as arbitrator which must involve the decision of matters connected with his own competency, care, and caution, and with the way in which he discharged his duties under the contract. The parties agree that the arbitrator is to adjudicate on matters in which he has an interest. Further, I understand it not to be disputed at the bar that, if the matter which the engineer had to decide was a matter involving the question of his own professional skill and competency, he would not be disqualified; and what additional fact is relied on as distinguishing the case from one in which his own professional skill and competency is involved? Simply this—that he would have to decide upon the professional skill and competency of his son instead of upon his own. I think that can make no substantial difference upon which this Court ought to act. I am unable to say that any reasonable probability is raised in my mind of any partiality on the part of the engineer. I am glad to think we can give effect to the discretion exercised by the master, the judge, and the Divisional Court. This appeal, therefore, fails.

DAVEY, L.J. I am of the same opinion. I confess I have had some doubt upon this point; but, upon consideration, I do not think there are sufficient circumstances to make it right in the present case to deprive the defendants of the benefit of the contract for arbitration which they have entered into. No doubt in a certain sense the engineer will be the judge of his own conduct, and no doubt that is a position which, primâ facie, raises some surprise in a judicial mind; but that is the contract of the parties. They have contracted that the servant of one of the parties to the contract shall be the arbitrator, and it appears to me that they have contracted that he shall be the arbitrator

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in cases which necessarily involve the correctness of his own opinion, the competency of his own advice and opinion as engineer, and the regularity of his own proceedings. It is sufficient to refer to clause 45 of the contract, which provides that, should the contractors in the opinion of the engineer fail in the performance of any part of the undertaking, then the defendants may take the works out of the contractors' hands and put an end to the contract. Suppose the engineer had been of opinion that the contractors had failed in the due performance of their contract, and the defendants had taken the work out of their hands, it could not be suggested that that did not fall within the clause 45, and yet the question in dispute would be whether the opinion of the engineer that the contractors had failed in such due performance was or was not well grounded. The same observation must be made upon clause 47, which provides that if the contractors do not proceed with the work, or any portion of it, to the engineer's satisfaction, either as regards materials, plant, or workmen, or the manner in which the same is being done, or the despatch which is being made; or, if for any other reason the engineer shall be of opinion that it is expedient that any part or parts of the work should be done by the board, and not by the contractors, then the engineer is to take the works out of their hands, and to assess the amount of compensation payable by them. In all those cases it is perfectly obvious that the parties did contemplate and intend that the engineer, notwithstanding the interest he would have in the subject-matter in dispute, should be the tribunal by which the disputes between the parties should be settled. It is not, therefore, in my opinion, any objection to the engineer's acting in this dispute that his conduct, or the conduct of his son as assistant engineer in directing the carrying out of the other works done in the Canada Dock, should be or might be called in question. It must have been within the contemplation of the parties that the engineer might have to superintend other works undertaken by the board during the progress of the contract works, and it seems to me to be an objection which the contractors waived, and deprived themselves of the right to insist upon, when they agreed that the engineer should be the sole arbitrator as regards themselves.

I have only to add that I do not think the suggestion that, although he might be trusted upon a question of his own professional skill, he cannot be trusted on a question of his son's professional skill, is one which the Court ought to entertain. I am, therefore, of opinion that, having regard to the nature of the contract, we cannot disturb the order of the Court below.

Appeal dismissed.

Solicitors for appellants: *Wynne, Holmes & Co., for Layton & Springworth, Liverpool.*

Solicitors for respondents: *Rowcliffes, Rawle & Co., for A. J. Squarey, Liverpool.*

W. A.

[IN THE COURT OF APPEAL.]

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THE BLYTH HARBOUR COMMISSIONERS *v.* THE CHURCHWARDENS, &c., OF NEWSHAM AND SOUTH BLYTH AND THE ASSESSMENT COMMITTEE OF THE TYNEMOUTH UNION.

Poor-rate—Rateable value—Enhancement—Occupation of Quays adjoining Harbour—Harbour Dues payable by Statute to Occupiers of Quays.

Commissioners for the improvement of a harbour were rated to the relief of the poor in respect of their occupation of quays adjoining the harbour. They were not owners or in occupation of the soil of the harbour; but, by the special Act which incorporated them, were empowered to demand and receive "harbour dues" for every vessel entering the harbour or departing therefrom or remaining therein, and "goods dues" in respect of all goods shipped or unshipped within the harbour. The facilities for berthing vessels alongside the quays, and for shipping and unshipping goods therefrom and thereon, caused a greater number of vessels to enter the harbour than would otherwise have entered it, and in consequence largely increased the amount of the dues payable to the commissioners; but vessels could be berthed, and goods shipped and unshipped, in other places in the harbour not occupied by the commissioners, and the same dues were payable whether vessels entering the harbour used the commissioners' quays or not:—

Held, affirming the decision of the Queen's Bench Division, that the dues received by the commissioners from vessels using their quays could not be taken into account as enhancing the rateable value of those quays.

APPEAL from a decision of the Queen's Bench Division. (1)

The Blyth Harbour Commissioners were rated to the relief of

(1) Ante, p. 293.

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the poor of the township of Newsham and South Blyth, in the county of Northumberland, in respect of their occupation of property described in the rate as "land and the tolls and dues arising therefrom or belonging thereto." The commissioners appealed against the rate to the Court of quarter sessions, and by consent of the parties and the order of Lawrance, J., a case was stated for the opinion of the Queen's Bench Division.

The facts may, for the purposes of this report, be shortly stated as follows:—

The Blyth Harbour Commissioners were incorporated and constituted for the improvement of Blyth Harbour by a special Act, 45 & 46 Vict. c. liv., and were empowered to demand and receive harbour dues "for every vessel entering the harbour," or "clearing or departing outwards, and for every vessel remaining within the harbour"; and goods dues "in respect of all goods shipped or unshipped, received or delivered, within the harbour." The commissioners were not owners or in possession of the soil of the harbour; but under their statutory powers they had become owners of and occupied land adjoining it, on part of which the quays in question had been constructed, and opposite one of those quays they had excavated and dredged out a piece of land vested in them, which was formerly dry land but was now covered by water, in order to provide berthing-places for ships lying opposite that quay. The facilities for berthing ships alongside all the quays in question, and for shipping and unshipping goods therefrom and thereon, caused a much greater number of vessels to enter the harbour than would otherwise have entered it, and consequently largely increased the amount of the harbour dues and goods dues payable to the commissioners. There were, however, other places in the harbour not in the occupation of the commissioners where vessels entering the harbour might be berthed and goods shipped and unshipped, and the same harbour dues and goods dues were payable to the commissioners whether vessels entering the harbour were berthed, and took in or discharged cargo, at their quays or not.

The questions for the opinion of the Court were substantially—whether the harbour dues or goods dues, or any or either of them, or any and what part of any or either of them, ought to be taken

into account as enhancing the rateable value of the quays in the occupation of the commissioners.

The Queen's Bench Division having given judgment in favour of the commissioners, the rating authority appealed.

Sir R. Webster, Q.C., and *Scott Fox* (*Balfour Browne, Q.C.*, with them), for the appellants, argued as in the Court below (1) and as appears from the judgments of the Court of Appeal. (2)

Lawson Walton, Q.C., and *T. W. Chitty*, for the respondents, were not heard.

LORD ESHER, M.R. I am of opinion that this case is entirely governed by principle, and, if authority be required, by the rules laid down in *Lewis* v. *Overseers of Swansea* (3), as to the proper mode of applying the true principle. Here the harbour commissioners are not owners of the soil of the harbour; but they have a right by Act of Parliament, in respect of the harbour and as the consideration for ships entering it, to impose dues or tolls upon all the ships which do enter it. The commissioners, if they say that they impose the dues by virtue of the Act of Parliament, cannot be rated in respect of those dues for the use of the harbour, for they are not the occupiers of it. The only persons who can be rated are the occupiers of the land; and, if in respect of the use of the land they get certain emoluments, that fact adds to the value of the land; but before they can be rated they must be the occupiers. The commissioners, therefore, could not be rated in respect of the harbour, and could not be rated in respect of the dues which are paid as a consideration for ships entering it. That being the position, the commissioners under their statutory powers purchase and become owners of land upon which they make quays; but the Acts which gave them power to make the quays did not give them the right to take dues in respect of the use of those quays. It gave them still a right to charge harbour dues in respect of the use of the harbour, but not any separate right to charge dues in respect of the quays. Now, the rating authority does not presume to rate the commissioners

(1) Ante, p. 296. (2) Post, p. 680.
(3) 5 E. & B. 508; 25 L. J. (M.C.) 33.

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in respect of the harbour, because it knows that they could not be so rated; but it does presume and assume to rate them in respect of the quays. It says in effect: "You are the owners and occupiers of the quays, and you obtain dues in respect of the use of those quays. The Act of Parliament has given you those dues, and the payments which you receive in respect of the quays must be taken into account in getting at their rateable value." That is quite true if the Act of Parliament has given them any dues in respect of the use of the quays, but quite untrue if it has not given them anything in that respect. The question is—and it has been the question in all the cases cited to us—whether the payment relied on by the rating authority is a payment in respect of the use of the land which they are rating, or a payment in respect of something else. In the *Swansea Case* (1) that was the question. Lord Campbell, C.J., puts this case: Supposing that the quay alone were let to a tenant, could it be taken into account against him that the tolls were paid? Lord Campbell says that the corporation in that case would get the money which the rating authority allege was paid in respect of the quays, and the hypothetical tenant would get none of it; so that it could not be said to be paid in respect of the use of the quays. Wightman, J., puts the matter still more obviously. He says that the question is "whether the toll is payable in respect of the use of the land," and he answers that question by saying, "If they" (it would be the harbour commissioners in the present case) "had not a foot of land, the toll would equally be payable to them." So here the dues would equally be payable to the commissioners if they had not a foot of land or an inch of quay. That test, applied in the *Swansea Case* (1), was also the test applied in the other cases which were cited to us. *Reg.* v. *Hull Dock Co.* (2), which was relied on by counsel for the rating authority, recognises precisely the same rule and principle; but the judges, having power to draw inferences of fact, drew the inference that the toll in question there was paid in respect of the use of the land to be rated. Having drawn that inference, the case came completely within the settled rule and principle. Whether the Court drew the right inference

(1) 5 E. & B. 508; 25 L. J. (M.C.) 33. (2) 7 Q. B. 2.

of fact—whether we should have drawn the same inference if the case had come before us under the same circumstances—is wholly immaterial. No case can be cited as a binding authority on a finding of fact. One case can only be cited in another for the purpose of shewing the rule of law which ought to be applied to the facts of that other; but the rule of law in the *Hull Case* (1) was precisely the same as that stated in the *Swansea Case.* (2) In the latter the judges, by applying the test, found in one way; in the *Hull Case* (1) the judges did not apply the same test in terms; they applied some other considerations with which we have nothing to do, but which led them to a certain conclusion of fact. We have here to deal with the judgment of the Court below. Charles, J., in delivering that judgment, said, with respect to the harbour dues and the dues on goods, "We have, then, to inquire for what they are paid. Are they paid for the use of the quays and mooring-posts, or apart from and independent of such use? It seems clear from the statements in the case that they are paid under a separate obligation and irrespective of the use of the quays altogether." Having there stated the question, and having referred to the judgments in the *Swansea Case* (2), he proceeds: "Having regard to the finding in the present case, that the dues are payable whether the quays are used or not, these observations appear exactly to apply to the Blyth Harbour Commissioners, who would receive the dues just as they do at present even if they did not occupy any of the quays." It cannot be denied that the latter statement is true in fact; and that being so, the conclusion at which the Court below arrived was, that it could not reasonably be said that the commissioners are paid the dues for the use of the quays and mooring-posts. Notwithstanding all the clever and astute arguments which have been put to us, one must ask oneself whether, if a person has to pay money whether he gets a thing or not, it can reasonably be said that he pays the money for getting the thing. The question answers itself: it cannot be so. I am of opinion, therefore, that the Court below have applied the right test, and come to the right conclusion. As to the *Hull Case* (1), I have shewn that we have no right to criticize it upon the only

(1) 7 Q. B. 2. (2) 5 E. & B. 508; 25 L. J. (M.C.) 33.

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question on which, to my mind, it is a fair subject for criticism, and the law laid down in that case seems to me the same law as is laid down in all the cases.

I am of opinion, therefore, both on principle and authority, that this appeal must be dismissed.

KAY, L.J. In this case the rating authority is rating the Commissioners of Blyth Harbour in respect of certain quays which are undoubtedly rateable. The quays are vested in the commissioners, and no one attempts to deny that some rate must be paid in respect of them. The question we have to decide is a question of quantum only. The attempt is made to raise the rateable value by reason of the fact that the commissioners are entitled to charge certain tolls and dues upon all ships entering the harbour. The argument ingeniously put forward on behalf of the rating authority is this: It is said that some part of the tolls and dues received by the commissioners ought to be attributed to the use of the quays, because a certain proportion of the ships entering the harbour lay up against the quays, are attached to the mooring-posts upon those quays, and discharge or load goods upon or from them. It is further said that that use of the land vested in the commissioners attracts more ships into the harbour than would otherwise come there, and that the value of the quays is enhanced by, at least, the harbour dues paid by those ships which moor against the quays. As to one of the quays the case goes a little further still. That quay is made on land which is vested in the commissioners, and ships which moor to it are, when so moored, lying above land now covered by water, which was formerly dry land and rateable, but has been excavated and dredged out, and made part of the basin of the harbour, either by the commissioners or their predecessors in title, and is also land vested in the commissioners. It was urged that the dues paid by ships which lie above that land, and are moored to that particular quay, ought, at any rate, to be treated as enhancing the rateable value of the quay. Now, I do not understand that we have anything to do with the rating of the land which is under water. The rating in question is the rating of the quay; but, supposing it includes the land under water, the original

position (which I state at once because I wish to state a difficulty which occurred to me in the course of the argument) was this: Originally the whole of the soil of the harbour was vested in the adjoining landowner, Sir M. W. Ridley. He still retains the whole of the soil of the harbour except that piece of land adjoining the particular quay which I have just referred to. Whilst the whole of the soil of the harbour was vested in him he was entitled to take, and did take, harbour dues from the ships which came into the harbour, and he was rated in respect of the harbour. The rate that he paid was on the value of the harbour, and the estimation of that rate would be enhanced by taking into account the dues which he received. In 1857 Sir M. W. Ridley assigned the dues to a dock company. By their special Act of 1854 the dock company were empowered to buy the interests of all persons then entitled to receive tolls or dues in respect of the use of mooring-anchors, mooring-posts, and hauling-posts and lights, and the Act provided that, as soon as they were bought, those tolls or dues should cease; and, after certain improvements had been executed by the dock company under the Act they were authorized to demand other tolls from ships using the harbour. Accordingly, in January, 1857, the dock company, in pursuance of the powers conferred upon them by the special Act, bought from Sir M. W. Ridley the tolls and rates leviable and receivable by him for the use of the mooring-posts, &c., in Blyth Harbour, and subsequently, in April, 1858, they bought from Sir M. W. Ridley certain portions of the ground or soil adjoining the harbour. In the same year an Act of Parliament was passed which authorized the company to demand and receive a rate for all vessels entering the harbour from the sea, and that rate was declared to include and to be in lieu of the rates, tolls, and dues purchased by the company from Sir M. W. Ridley, which, as I have said, were to cease. I need not refer further to that Act of Parliament, because the sections which related to rates, tolls, or dues were repealed by an Act of 1882, which is now in force. That Act vested the whole of the property of the dock company in the present commissioners, and empowered them to demand specified rates, tolls, or dues "for every vessel entering the harbour, and for every vessel clearing or departing outwards, and for every vessel

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remaining within the harbour," and "in respect of all goods—i.e., wares, merchandise, and articles of every description—shipped or unshipped, received or delivered, within the harbour." Now, there is not a word in that Act of Parliament about any rate, toll, or due being payable in respect of these quays. The harbour dues are payable on all ships entering the harbour, and it is, therefore, plain that any ship which was moored to any of the quays became by virtue of the Act liable to the dues when it entered the harbour and before it reached the quay, and, further, that every ship entering the harbour had to pay exactly the same dues whether it moored to the quays or not. The real question we have to decide is whether or not any of the harbour dues can be treated as payable "in connection with"—to use the language of some of the cases—any of the quays. When one finds that the dues are payable on the ship before it reaches the quay, and that they are payable on every ship coming into the harbour whether it goes to the quay or makes any kind of use of the quay or not, it is certainly extremely difficult to say that any of these dues can be treated as being payable in connection with the quay. I have referred to the facts, which are fully and accurately stated by the learned judge in the Court below, for this reason: As I have said, it appears that Sir M. W. Ridley had been rated in respect of the harbour, the value of the harbour being treated as enhanced by reason of the harbour dues which he received. After he had parted with the right to receive harbour dues, either he still remained liable to be rated on that enhanced value or he did not. If he did not, then the rate (if any) which is now payable by him in respect of the harbour will be upon a different, and possibly upon a lower, value. A part of the rate which he formerly had to pay may, therefore, be lost, and it occurred to me, as a difficulty, that it would be hard upon the other ratepayers of the parish if no equivalent for the rate formerly paid by him could be exacted from the persons who are now in possession and in the enjoyment of the harbour dues. But, after all, we have to look at the Act of Parliament, and the real question comes to this: Do the rates and harbour dues imposed by the Act of 1882 in any way relate to the particular quays in question, or are they not practically tolls in gross

payable for the use of the harbour, and not in respect of the particular quays? On the whole, for the reasons (which I will not repeat) given by the Master of the Rolls, I feel bound to come to the conclusion that, under the Act of 1882, there is nothing which shews that any part of the harbour dues are paid in respect of the quays. The Act, it is plain, newly created and imposed the dues in lieu of all other tolls or dues, which were directed to cease. All the sections of the previous Act under which tolls or dues were enacted were repealed, and the new tolls or dues imposed by the Act of 1882 seem to me to have no such connection with any of these quays that any part of such tolls or dues can fairly be attributable to any of the quays.

I am of opinion, therefore, that the learned judges in the Court below came to a right conclusion.

A. L. SMITH, L.J. This matter comes before us on a case stated, and we have to inform the Court of quarter sessions in what way judgment is to be entered having regard to the dispute between the parties. The short point raised in the case is in reality simply this: "Is, or is not, the rateable value of the quays on the south side of Blyth Harbour to be enhanced by taking into account the harbour dues imposed by the Act of Parliament? The law on the subject has been stated by the Master of the Rolls, and he has referred to the law laid down in the *Swansea Case.* (1) I will add thereto a statement of the law as laid down by Blackburn, J., in *New Shoreham Harbour Commissioners* v. *Lancing* (2), because that statement, in my judgment, is very apposite to the case before us. He says (at p. 496): "It is very clear in law that tolls are not per se the subject of a rate. It is equally clear that, when parties occupy land, they are rateable for the value of that land, and that tolls, though not rateable, may be considered as enhancing the value of the occupation of the land, whenever it appears that the occupation of the land is so connected with them that it can be said that the tolls or rates are levied on account of the occupation of the land; or, perhaps, though not levied on account of the occupation of the land, where they could not be received without an

(1) 5 E. & B. 508; 25 L. J. (M.C.) 33. (2) Law Rep. 5 Q. B. 489.

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A. L. Smith, L.J.

occupation of land." I take that to be the law; and, applying it to the present case, are these harbour dues so connected with the occupation of the land that it can be said that they are levied on account of the occupation of the land? That brings me at once to the consideration of the Act of Parliament under which the harbour dues are payable, and, according to the schedule to the Act, they are payable for every vessel entering the harbour, or clearing from it, or remaining in it. It seems to me impossible to say that the harbour dues are payable in respect of the berths at the quays. It matters not where the vessels go: as soon as they enter the harbour, and as soon as they remain in it over the specified time, the harbour dues are to be paid. How, then, can it be said that they are paid in connection with the quays? The commissioners could not sue the ship for quay dues. They could only sue for what is given to them by the Act of Parliament, and there is nothing in it entitling them to quay dues. They are only entitled to the harbour dues which I have mentioned, and there is no allocation whatever of any of those dues to the quays. It seems to me that the judgment of the Court below is absolutely right in deciding that, applying the true rule of law to this case, the occupation of the quays, or any of them, is not so connected with the dues that it can be said that the dues are levied on account of the occupation of the land. The dues are not payable on account of the occupation of the land; nor do they touch or concern it; nor are they dues which, though not levied on account of the occupation of the land, could not be received without an occupation of land. They are received perfectly irrespective of the occupation of the quays. It was ingeniously argued on behalf of the respondents that, but for the construction of the quays, so many ships would not come into Blyth Harbour; that an obligation to construct the quays was imposed upon the commissioners by Act of Parliament, and the harbour dues were given to them for carrying out that obligation as a quid pro quo. But I have searched through the Acts in question and can find no obligation upon the commissioners to execute the works at all. Every one of the sections relating to the work is permissive only, and it has been frequently held in the Exchequer Chamber

that you must have obligatory words in the Act in order to compel bodies such as commissioners or railway companies to construct their works, though the Act does give them power to construct them. It is, therefore, not true to say here that the commissioners were under an obligation to construct the quays. They might do it or not; but, whether they did make the quays or not, the harbour dues would be payable, under the Act of 1882, for every ship entering, going out of, or remaining in, that harbour.

I think it is perfectly clear that the Court below arrived at the right conclusion, and that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Williamson, Hill, & Co.*, for *Whitehouse, North Shields.*

Solicitors for respondents: *Crossman & Prichard*, for *Dees & Thompson, Newcastle.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1894
July 2.

ROBINSON *v.* GEISEL AND OTHERS.

Practice—Parties—Joinder of co-Contractors as Defendants—Inability to serve one of several Defendants—Staying Action till Service—Order XVI., r. 11.

Where an action is brought against several joint contractors, all of whom are within the jurisdiction, the action will not be stayed on the ground that one of the defendants has not been served, if it appears that the plaintiff has done everything in his power to effect service.

APPEAL from an order of the Queen's Bench Division refusing to stay the action.

The action was brought on a guarantee by the defendants, Geisel, Schreiber, and Hoffman, to answer for the debt or default of a person who was about to enter the employment of the plaintiff. The plaintiff brought an action on the guarantee in the first place against Geisel alone, and an order was obtained that the other two joint contractors should be added as defendants, and that in the meantime the action should be stayed. The other two defendants were accordingly added and one of

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them, Schreiber, was served, but not the other. An amended statement of claim was delivered to Geisel, who thereupon took out a summons to stay the action until Hoffman should be served. It was alleged that Hoffman was not within the jurisdiction, and the application at chambers was dismissed. On appeal to the Divisional Court the order dismissing the application was confirmed. Subsequently information was obtained that Hoffman was within the jurisdiction, and the plaintiff filed an affidavit stating the efforts that had been made to find Hoffman and that they had entirely failed.

The defendant Geisel appealed against the order of the Divisional Court.

Hume Williams, in support of the appeal. *Kendall* v. *Hamilton* (1) and *Pilley* v. *Robinson* (2) shew that where an action is brought against one only of several joint contractors the defendant is entitled as of right to have the other co-contractors joined as defendants. *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (3) excepts the case where one of the co-contractors is out of the jurisdiction. Here the evidence now before the Court shews that Hoffman is within the jurisdiction, and the plaintiff is bound to serve him so as to make him an actual party to the litigation.

H. Mitchell, for the plaintiff, was nct called on.

LORD ESHER, M.R. I think that the objection made to this order fails; but I also think that some of the statements made in the former cases that have been cited cannot be supported.

In the present case the plaintiff was willing to employ a certain person as his agent on obtaining a guarantee, and such a guarantee was given by the defendant Geisel and two others. The person for whom the guarantee was given is, according to the plaintiff, in default in his accounts, and thereupon this action was brought on the guarantee.

According to the law as it formerly stood, the plaintiff would have been bound to bring his action against all three of the

(1) 4 App. Cas. 504. (2) 20 Q. B. D. 155.
(3) [1893] 1 Q. B. 422.

guarantors, except in the case of any of them being abroad; and if he did not do so there might have been a plea in abatement, and the action would have been stayed till he did. Then came the Judicature Acts and the orders made under them. By Order XVI., r. 11, no cause or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it; and by Order XXI., r. 20, no plea or defence shall be pleaded in abatement. If, therefore, in any case the Court finds that in any cause or matter an order to join other parties will prevent the Court dealing with the rights and interests of the parties actually before it, it would be in direct contravention of the rule to make such an order.

It is said that the case of *Pilley* v. *Robinson* (1) laid down that where an action is brought against one only of several joint contractors the defendant is entitled as of right to have his co-contractors joined as defendants; but if that case was not overruled in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (2), it was to some extent explained. The state of the law seems to me to be this: if the co-contractors are within the jurisdiction and can be found, they ought to be joined, not because it is obligatory on the plaintiff to join them, but because, if there is no reason to the contrary, all the co-contractors ought to be joined as defendants. If it were shewn in this case that all might have been joined, it would be right to compel the plaintiff to take that course. We are not bound by the conclusion at which the judge at chambers arrived, for in accordance with the ordinary practice we have been supplied with further materials on which to come to a conclusion. It now appears that the third co-contractor is within the jurisdiction; but is it true to say that on this account the Court must declare that the plaintiff is bound to serve him? The point was not decided in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (2); but there is a strong intimation of opinion. In my judgment at page 427 of that case I said: "It is not necessary to say that, even where all the joint contractors are within the jurisdiction, there might not be

(1) 20 Q. B. D. 155. (2) [1893] 1 Q. B. 422.

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circumstances under which the Court could refuse to insist on their all being joined as defendants. It is not necessary to decide that point in this case. I doubt whether in extreme cases the Court would be bound, even in that case, to order the joinder of a joint contractor; but, as a general rule, I should say the Court would be bound to do so." This is, in other words, an intimation that there may be reasons why, although the co-contractors are within the jurisdiction, the plaintiff should not be bound to join them. What are the circumstances that would warrant the Court in taking this course, unless that to do otherwise would defeat the power of the Court to deal with the rights and interests of the parties actually before it? It seems to me that if it is apparent that every effort has been made to find the co-contractor, the Court may say that it would be contrary to the spirit of Order XVI., r. 11, that the determination of the plaintiff's rights should be put off indefinitely. I am the more convinced that this is the right course to take because it by no means defeats the right of the defendant against his co-contractor, though it may possibly put him to greater inconvenience than if the action had been tried against all jointly. I come, therefore, to the conclusion that the order of the Queen's Bench Division was right, and that the appeal must be dismissed.

KAY, L.J. In this case an action has been brought against one of three joint contractors who required that the other joint contractors should be joined. He obtained an order to that effect, and they were added as defendants and one of them was served. The result of the evidence before us is, that the third joint contractor is within the jurisdiction but cannot be found. The way the question strikes me is this: Is it right or fair that where the plaintiff has done all he can to bring in all the persons who ought to be joined as defendants, his action should be stayed for an indefinite time until he is able to find them all? In my opinion it would be unjust, under the circumstances of this case, to stay the plaintiff's action against the defendants whom he is able to find, unless there is some rigid rule of law that obliges him to have all the defendants before the Court before he can proceed against any of them.

The rules seem to me to be directed to this—that when pleas of abatement were abolished there should be a large discretion in the Court to permit an action to go on, so that the rights of the parties before the Court may be determined even though all parties to the action are not before it. The Court below in its discretion allowed this action to go on; and certainly this Court, with its present knowledge of the facts of the case, ought to take the same course.

A. L. SMITH, L.J. In *Pilley* v. *Robinson* (1) the Divisional Court held that one co-contractor who is sued is entitled as of right to have his co-contractors joined as defendants. A similar point, though on different facts, came before this Court in *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (2), in which it was held, that where one co-contractor is out of the jurisdiction it is not necessary to the continuance of the action that he should be joined as a defendant. So far that case overruled the hard and fast line laid down in *Pilley* v. *Robinson.* (1) The Master of the Rolls foresaw that such a case as that now before us might arise, and expressed the view that there might be circumstances under which the Court could refuse to insist on all the joint contractors being joined as defendants. That case has now arisen, and I agree with the view then expressed, and now confirmed by the Master of the Rolls. It seems to me that if there are two joint contractors resident within the jurisdiction, the rule is that both should be brought in to defend unless there is good reason to the contrary. In the present case there is ample reason why the plaintiff, who has done all that he can to find the other co-contractor, should not have his action stayed because he cannot serve him. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Wood, Bird, & Wood.*
Solicitor for defendant: *H. Pumfrey.*

(1) 20 Q. B. D. 155. (2) [1893] 1 Q. B. 422.

A. M.

1894
May 24.

FIGG v. MOORE BROTHERS.

Bankruptcy—Goods taken in Execution—Seizure—Possession by Sheriff for twenty-one Days—Payment out—Act of Bankruptcy—Notice—Title of Trustee in Bankruptcy—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 46—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11.

By s. 1 of the Bankruptcy Act, 1890, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days:—

Held, that to entitle an execution creditor to retain the benefit of his execution as against the trustee in bankruptcy, the execution must be completed either by sale or receipt of the amount of the levy before the sheriff has been in possession for twenty-one days, otherwise the title of the execution creditor may be defeated by the act of bankruptcy committed by the debtor under s. 1 of the Bankruptcy Act, 1890, of which the execution creditor must be taken to have had notice.

Ex parte Villars (Law Rep. 9 Ch. 432) distinguished.

THIS was an action by the trustee in bankruptcy of Messrs. Lichtenstein & Breeze, formerly trading as the Alliance Iron Company, claiming payment from the defendants of the sum of 41*l.* 0*s.* 11*d.*, as part of the bankrupts' estate, under these circumstances.

On September 23, 1892, the defendants in an action in the High Court of Justice recovered judgment against Messrs. Lichtenstein & Breeze for the sum of 41*l.* 0*s.* 11*d.*, including costs.

On September 26, 1892, the sheriff, under a writ of fi. fa. issued by the defendants on their said judgment, seized certain goods of the judgment debtors.

On October 11, 1892, the judgment debtors held a meeting of their creditors, which had been convened by a circular letter, and offered certain terms which were declined. Thereupon the debtors committed an act of bankruptcy by intimating to the meeting that they had suspended, or were about to suspend, payment of their debts. The defendants did not attend this meeting, although they received the circular letter, and had no notice of what took place thereat.

On October 17, 1892, the sheriff had been in possession twenty-one days. (1)

On October 19, 1892, the sheriff was paid out, and on October 21 he wrote and informed the defendants of that fact. The sheriff, after deducting the costs of the execution from the moneys paid him, retained the balance of 41*l.* 0*s.* 11*d.* for fourteen days pursuant to s. 46 of the Bankruptcy Act, 1883, and on November 2, 1892, not having received notice of any bankruptcy petition against the judgment debtors, paid it to the defendants.

On November 30, 1892, a receiving order was made against the judgment debtor on a creditor's petition, and adjudication followed.

Sinclair Cox (*Lawson Walton, Q.C.*, with him), for the plaintiff. The plaintiff relies on the acts of bankruptcy committed on October 11 and 17, 1892.

[VAUGHAN WILLIAMS, J. The onus is on the defendants to make out their title.]

H. Wace, for the defendants. The defendants had no knowledge of what took place on October 11. They levied execution without notice of any act of bankruptcy committed by the judgment debtors, and obtained by the common law a good security for their debt, and that is not displaced by the act of bankruptcy committed on October 17: *Edwards* v. *Scarsbrook* (2); *Slater* v. *Pinder*. (3) The 45th section of the Bankruptcy Act, 1883, does not apply to an execution that has been paid out: *Ex parte Brooke* (4); *Re Pearson* (5); and the defendants do not lose the benefit of their security merely because the sheriff being in possession for twenty-one days is now made an act of bankruptcy by s. 1 of the Bankruptcy Act, 1890. By s. 11 of the Bankruptcy Act, 1890, the completion of an execution,

(1) The Bankruptcy Act, 1890, s. 1, enacts: "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days."

(2) 3 B. & S. 280.

(3) Law Rep. 6 Ex. 228.

(4) Law Rep. 9 Ch. 301.

(5) 3 Morr. 187.

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whether by sale or payment out, is carefully placed on the same footing, and it is submitted that the principle of *Ex parte Villars* (1) applies, and that the title of an execution creditor is not avoided by notice of the act of bankruptcy occasioned by his own act, whether it arises from the seizure and sale or by the sheriff holding for twenty-one days. Next, there is no evidence where the money came from, and unless it be shewn that it was the debtors' money which was paid to the sheriff the defendants are entitled to retain it.

Sinclair Cox, in reply. Sect. 11 of the Bankruptcy Act, 1890, must be read with s. 45 of the Bankruptcy Act, 1883. The completion of the execution here was the payment to the sheriff, and two days previously an act of bankruptcy had been committed under s. 1 of the Bankruptcy Act, 1890, of which the defendants must be taken to have had notice. As to the payment of the money, the presumption is that it was the debtors' money.

VAUGHAN WILLIAMS, J. The point raised here to-day is a new one; but having had the benefit of the arguments on both sides, I do not think I need consider the matter further, and I will decide it now. [The learned judge then stated the facts above detailed, and held that the defendants were not affected by the act of bankruptcy committed on October 11, 1892, they having had no knowledge of it, and continued:—] I agree with Mr. Wace, that apart from any express statutory enactment a judgment creditor who levies execution gets by the common law a good title by the seizure of the sheriff, if he has no notice of any available act of bankruptcy committed by the debtor. Here the sheriff had seized prior to any act of bankruptcy being brought to the knowledge of the defendants, and by the common law they are entitled to the benefit of that execution, unless their rights are displaced by some express statutory enactment. Now, has that common law right of the defendants been taken away by s. 45 of the Bankruptcy Act, 1883? That section provides (sub-s. 1), that where a creditor has levied execution against the goods of a debtor, he shall not be entitled to retain

(1) Law Rep. 9 Ch. 432.

the benefit of the execution against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor; and sub-s. 2 says, that for the purposes of the Act an execution against goods is completed by seizure and sale, or—reading in s. 11 of the Bankruptcy Act, 1890—receipt or recovery of the full amount of the levy. Now, in no sense can it be said that the execution here was completed until October 19, when the sheriff was paid out. Then, did the defendants complete the execution before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtors, or of the commission of any available act of bankruptcy by the debtors? In my judgment they did not complete the execution before notice of the commission of any available act of bankruptcy by the debtors, because I think that two days before October 19, namely, on October 17, an act of bankruptcy had been committed under s. 1 of the Bankruptcy Act, 1890, which enacts that a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in any action in any Court, or in any civil proceeding in the High Court, and the goods have been held by the sheriff for twenty-one days; and of that act of bankruptcy the defendants must be taken to have had notice. Under those circumstances, I hold that the defendants have lost their common law rights. It was urged that the principle of *Ex parte Villars* (1) applied to this case; but I think it is clearly distinguishable. In that case it was held that an act of bankruptcy committed by seizure and sale under a levy did not render inoperative the seizure and sale itself, so as to deprive the creditor of the fruits of his diligence. In such a case it is obvious that the act of bankruptcy is not committed until immediately after the completion of the transaction on which it is founded. But here, at the time when the transaction was completed by the money being paid to the sheriff, the execution creditors had notice that two days previously this act of bank-

(1) Law Rep. 9 Ch. 432.

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FIGG v. MOORE BROTHERS.

ruptcy had been committed, because they cannot be heard to say that they did not know that the sheriff had been holding the goods for twenty-one days. Then it was said that there was no evidence that the money was part of the property of the debtors. I agree; but primâ facie it must be taken to be the money of the debtors, and that presumption is not displaced by any evidence on behalf of the defendants. I therefore give judgment for the plaintiff.

Solicitors for plaintiff: *Rodgers & Co.*
Solicitors for defendants: *Dale & Co.*

H. L. F.

C. A.

1894
July 9.

[IN THE COURT OF APPEAL.]

THE DARLASTON LOCAL BOARD *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway and Canal Commission—"Reasonable facilities for the receiving and forwarding and delivering of Traffic"—Closing Station for Passenger Traffic—Order of Railway Commissioners involving Re-opening Station—Jurisdiction—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2.

By the Railway and Canal Traffic Act, 1854, s. 1: "The word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic"; and by s. 2: "Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively. . . ."

A railway company closed, for passenger traffic, a station, on a branch line which they had been authorized by statute to make, as they were incurring a loss by keeping it open. The station was subsequently pulled down. Passenger service was discontinued over the branch line, as without the station it would have been of no advantage to the public. On an application by a local board to the Railway Commissioners, the commissioners made an order reciting that the applicants had complained that the company had ceased to use the branch railway for the conveyance of passengers, and had closed the station on such railway previously used for such traffic, and that such complaint had been proved to be true, and requiring the company to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic upon and from the said railway. The reasonable facilities ordered could not be afforded unless the station were rebuilt. On appeal:—

Held, that the commissioners had no jurisdiction to make the order.

By Lord Esher, M.R., and A. L. Smith, L.J., on the ground that the Railway

and Canal Traffic Act, 1854, does not compel a railway company to maintain and use its railway or stations, and the company was within its rights in closing the station.

By Kay, L.J., on the ground that, if an order could be made in any case to keep a station open, such an order, when it would compel a railway company to carry on their business at a loss, was not an order on them to give "reasonable facilities" within the meaning of the statute.

APPEAL from an order of the Railway Commissioners, reported ante, p. 45.

The railway company closed a station, on one of their branch lines, for passenger traffic, as they were incurring a loss by keeping it open. The Darlaston Local Board applied to the Railway Commissioners for an order requiring the company to afford reasonable facilities for receiving, forwarding, and delivering passenger traffic on the branch line, and to re-open the station. The commissioners made an order reciting the complaint, and that it had been proved to be true, and directing the company to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic upon and from the branch line.

The railway company appealed against this order.

The facts upon which the complaint was founded are set out in the report of the case before the commissioners. (1)

June 20. *Sir R. Webster, Q.C.* (*Pope, Q.C.*, and *C. A. Russell* with him), for the railway company. It is clear from *South Eastern Ry. Co.* v. *Railway Commissioners* (2) that the company could not be ordered to make a new station. Here there is in fact no station existing, and the order of the commissioners amounts to a direction to the company to open what would be in effect a new station. There is no statutory obligation on the railway to continue the use of the railway, and they could not be compelled to do so, as the right to open and the privilege to maintain are permissive: *Reg.* v. *York and North Midland Ry. Co.* (3); *Reg.* v. *Great Western Ry. Co.* (4); and the same principle applies to the use of a station. The Railway and Canal Traffic Act, 1854, does not increase their obligation in this respect, for the duty to afford reasonable facilities applies only to the case of a railway or

(1) Ante, p. 45.
(2) 6 Q. B. D. 586.
(3) 1 E. & B. 178, 858.
(4) 62 L. J. (Q.B.) 572.

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DARLASTON LOCAL BOARD v. LONDON AND NORTH WESTERN RAILWAY CO.

station "used for public traffic"—that is, one actually in use when the order for reasonable facilities for its use is made. If the company, when once they have made and used a station, are bound to keep it open, which is really the effect of the order, though that conclusion is disclaimed by Wills, J., the words of the statute "used for public traffic" are superfluous.

Cripps, Q.C. (*Balfour Brown, Q.C.*, and *E. T. Slater*, with him), for the Darlaston Local Board. The only appeal is on a question of law, and the adjustment of reasonable facilities between the railway and the public must be a question of fact. Assuming there is no obligation on the company, it can hardly be said that an order as to carrying on a certain class of traffic is illegal because that traffic can only be carried on at a loss.

Assuming that there is no obligation on the company in this case apart from the Railway and Canal Traffic Act, 1854, that Act is imperative that the company shall afford reasonable facilities. The company use the railway and do not give such facilities, and, further, they were using the station. The case is in effect the same as if this application had been made directly the company ceased to use the station, and the company would not have been able to oust the jurisdiction of the commissioners by saying that the use of the station had been discontinued two days before the application. The *South Eastern Ry. Co.* v. *Railway Commissioners* (1) contains nothing to shew that the obligations of the company can be defeated by a discontinuance of the use of a station. In the words of Lord Selborne, at p. 592, "The company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic and invites the public to resort to it," and in such a case they are bound to afford reasonable facilities for its use. *Reg.* v. *Great Western Ry. Co.* (2) was an application for a mandamus under a private Act. In *Dickson* v. *Great Northern Ry. Co.* (3) the new obligations imposed by the Railway and Canal Traffic Act, 1854, are discussed in the judgment of Lindley, L.J., and, among these, is the duty to afford reasonable facilities for carrying passengers, goods, and animals. This, the company, in the opinion of the commissioners,

(1) 6 Q. B. D. 586. (2) 62 L. J. (Q.B.) 572.
(3) 18 Q. B. D. 176.

have failed to do, and their order, which is general, and does not direct any structural works, was made to remedy this state of things.

[He also cited *Winsford Local Board* v. *Cheshire Lines Committee.* (1)]

Sir R. Webster, Q.C., in reply.

Cur. adv. vult.

1894. July 9. LORD ESHER, M.R. This is an appeal from a decision of the Railway Commissioners. An application was made to the Railway Commissioners by the local board for the district of Darlaston under the 2nd section of the Railway and Canal Traffic Act, 1854, for an order requiring the London and North Western Railway Company to afford reasonable facilities for the receiving, forwarding, and delivering of passenger traffic on their branch line between Wednesbury and James Bridge Stations, and to re-open Darlaston Station for this purpose. The facts, about which there was no dispute, were that at one time there was a Darlaston station used for passenger traffic. That state of things continued for several years, but the directors of the company found that in each year it produced a loss, and they resolved to close and do away with the station altogether, and they did so. They closed the station, and they pulled down the buildings of the station. I have no doubt, whatever may be said as to leaving some boards which might be a platform, they pulled down the station entirely, and that state of things continued for some five years; and then this application was made to the Railway Commissioners, to which the Railway Commissioners have acceded, and have made an order, which it is admitted could only be obeyed by re-opening Darlaston Station for the purpose of traffic. In order to open it for passenger traffic so as to satisfy any requisition of the Railway and Canal Traffic Act, it is obvious that that station practically must be rebuilt. Therefore the order which was asked for and which has been granted really comes to this: an order of the Railway Commissioners to make a new station instead of the old station, and to re-open it for passenger traffic.

(1) 24 Q. B. D. 456.

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Now, the matter depends upon the construction of 17 & 18 Vict. c. 31, s. 2: "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively." If anything is done in violation or contravention of that stipulation of the Act any person may apply in a summary way by motion or summons to the Railway Commissioners. That is what that Act and a subsequent Act come to. By s. 1, "the word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic." It seems to me a necessary implication that the word "railway" in s. 2 does not include a station which is not in use for the purposes of public traffic. Is that a true construction of the statute? I am of opinion that that construction of the statute was determined by this Court in the case of *South Eastern Ry. Co.* v. *Railway Commissioners.* (1) Wills, J., I observe, says (2): "In that case the Court of Appeal certainly decided that this Court has not jurisdiction to make an order for 'reasonable facilities' which can only be complied with by the opening of a new station. I confess that but for the decision I should have thought that much might have been urged against this view of the effect of the section." That seems to me to express a doubt by Wills, J., as to whether the decision of this Court in the *Hastings Case* (1) was correct. It is not right for me to consider whether his doubt is well founded or not, because I have no authority and cannot assume to have any authority to overrule a former decision of this Court, but out of respect to him I will say this, that I have considered whether in my opinion his doubt is well founded, and I do not think it is. I feel just as clearly now as I did when I sat with Lord Selborne in the former case, that the decision in that case was perfectly right. So that not only should I be unable to overrule it, but if I could, I would not, because I think it was right. Then what does the case come to? It comes to this, that when you talk of giving reasonable facilities, you mean thereby to insist upon a reasonable use. How can there be a facility unless

(1) 6 Q. B. D. 586. (2) Ante, p. 52.

in the use of an existing thing? It follows, therefore, that this summary process, by motion or summons, does not apply to the making of a railway, nor does it apply to the making of a station—certainly not to the giving facilities for a station not in use. Supposing a railway company had obtained an Act of Parliament which imposed upon them a duty to build a railway, or to build a branch of a railway, and they neglected that duty, can these words give to the commissioners the power on motion or summons in a summary way to order the company to build the railway? It seems to me that the very words shew that they could not do such a thing, and that if a railway company had entered into such an obligation and neglected their parliamentary duty, the only Court which could enforce that would be the Court which can issue a mandamus for that purpose, that is the High Court. If a railway company bound to continue its railway for the use of the public were to neglect that duty, and were proposing to put an end to its railway, what would be the remedy? That does not, in my opinion, raise any question of affording reasonable facilities. It is a question of putting an end to their railway when they ought to keep it up. The remedy is to go to the High Court for an injunction to that railway to keep on working and not put an end to its working. Therefore the question of whether a railway is to be made, or a branch of a railway is to be made, or a question whether the railway is bound not to cease working as a railway, or not to cease working a branch of that railway, is a question of mandamus or injunction in the High Court, and is not a question for the commissioners to decide in a summary way on motion or summons. Still more must it be so if the Act of Parliament under which the railway is made, or the railway company is constituted, does not oblige them to open the railway, or does not oblige them to continue the railway open, but authorizes them to make a railway, and authorizes them to work it. The commissioners can only, where the railway is in existence, and being worked as a railway, determine the question whether that railway is giving reasonable facilities for the receiving and forwarding and delivering of traffic. The same thing applies to a station. Upon a true construction of

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this Act of Parliament, it is obvious that although in one sense a station is part of a railway, it is not a part of the railway as spoken of in s. 2. A station for the purpose of this Act is separated from the railway, and a station is therefore to be called a railway, but is for this purpose a separate thing to be dealt with. It is upon that view that the *Hastings Case* (1) was determined, and you find Lord Selborne saying, at p. 592, "With respect to stations, there is no obligation to establish them at any particular places or place unless the company thinks fit to do so. The railway (as interpreted by the Act) only includes existing stations 'used for the purposes of public traffic.' But when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it, ... it is, in my opinion, bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for 'receiving,' 'forwarding,' and 'delivering' such passengers and goods." That was Lord Selborne's judgment. Lord Coleridge agreed in that judgment. In my judgment I said: "Applying these propositions to the present dispute, it follows that the defendants," who were the Railway Commissioners, "had jurisdiction only to hear and determine and order in respect of facilities to be afforded upon or from the railway or the stations used by the company for the purposes of public traffic. This description of the railway and stations, namely, that they are used by the company, confines their jurisdiction"—that is, the jurisdiction of the then defendants—"to a dealing with the existing railway and the existing stations, and prevents them from ordering the making of any new railway or any new station." Wills, J., in this case says: "I think that we are justified in laying down the general proposition that, where a station exists, and there is at that station a substantial amount of passenger traffic, for the railway company to close that station without providing an equivalent is a breach of the obligation to give 'reasonable facilities' under the section, the word 'railway' in which is defined by words of extension as including 'every station of or belonging to such company used for the purposes of public traffic.'" Now the extent to which

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he goes may be shewn by this: he says the company endeavoured in good faith for several years to provide an efficient passenger service, and it was only when they found that they were incurring a heavy loss that they closed the line for passenger traffic. We think that in doing so they acted illegally." Wills, J., and the commissioners have acted in accordance with a case which they decided of the *Winsford Local Board* v. *Cheshire Lines Committee.* (1) I think that, in so doing, they have acted contrary to the decision of this Court, which has held that they have no jurisdiction to do what they did in that case, and what they have done in this case. I adhere to what was said in the *Hastings Case* (2), that they cannot prevent a railway company from absolutely pulling down a station if they think they ought, or if they choose to do it, any more than they can order a railway company to build a new station. If, therefore, the application made to them, which they have acceded to in this case, had been made two months after they had resolved to do away with Darlaston Station, and had done away with it, in my opinion the Railway Commissioners would have had no jurisdiction to order the railway company to reinstate it. When I come to consider that this station had been down and was not in existence for five years, and then the company are told in words to reinstate it, the only sensible meaning of that is: make another station as like as you can to the one you had before. On the *Hastings Case* (2) it is clear to my mind the commissioners could not make such an order. I therefore think that their decision is wrong, on the ground that they had no jurisdiction to make it. I am of opinion that their decision cannot stand and must be reversed.

KAY, L.J., read the following judgment. The London and North Western Railway Company have a branch line which runs in a curve from their main line at James Bridge Station (formerly called Darlaston passenger station) through Darlaston to Wednesbury. On this branch there was formerly a passenger station at Darlaston. Finding that they were losing money by it, they about 1887 discontinued the use of this station, and in 1889 they

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pulled it down. Since then the Darlaston passenger traffic has gone to James Bridge Station, one mile distant by road from Darlaston, or to Wednesbury, about one and a half miles distant. There is another branch from Wednesbury to the main line. There are steam tramways from Darlaston to both Wednesbury and James Bridge.

This is an application by the Darlaston Local Board, under s. 2 of the Railway and Canal Traffic Act, 1854, and the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), for an order requiring the railway company to afford reasonable facilities for receiving, forwarding, and delivering passenger traffic on this branch line, and to re-open Darlaston Station for this purpose. The Railway Commissioners have acceded to this application, and by an order reciting that the company have ceased to use this branch for passenger traffic and have closed the Darlaston Station, the commissioners have required the company, their agents, and servants, to afford reasonable facilities for receiving, forwarding, and delivering passenger traffic upon and from the said railway. This order of course is intended, though it does not say so in terms, to compel the company to re-open and rebuild the Darlaston Station.

In the judgment of the commissioners, delivered by Wills, J., it is decided: (1.) That the Act of 1854 imposes upon railway companies an obligation to give reasonable facilities. (2.) That this obligation was broken by the discontinuance of passenger traffic on this branch line. (3.) That as there was at the time of closing Darlaston Station an amount of passenger traffic at it which, though not large, was still substantial, it was a breach of the obligation to close it without providing an equivalent. (4.) That as closing the branch for passenger traffic was an illegal act, it was proper to make the present order.

I take the facts as they are found by the commissioners. In their printed judgment the circumstances of the case are very explicitly stated in the following words: "It is but too plain that the line must be worked at a loss, and we regret to impose this burden upon the respondents. They endeavoured in good faith for several years to provide an efficient passenger service, and it was only when they found that they were

incurring a heavy loss that they closed the line for passenger traffic."

The utmost that the Act of 1854 requires is that railway and canal companies should afford "reasonable facilities" to the public. That must mean reasonable as regards the company as well as the public. This seems to be recognised in the judgment of the commissioners. They say that the service to be established must be reasonable from the point of view of the respondents, the railway company, as well as the applicants. The decision is that it is reasonable to require a railway company to give facilities to the public which involve a heavy loss to themselves, after having "endeavoured in good faith for several years" thus to accommodate the public. With deference, this seems to me to disregard the plain language of the Act, and to assume a jurisdiction to compel a railway company to give unreasonable facilities; which is contrary to the terms of the statute, and therefore beyond the jurisdiction of the Railway Commissioners. This consideration alone compels me to the conclusion that the commissioners, upon the facts, as found by them, had no jurisdiction to make this order.

But the question argued on this appeal was much larger and more important, and is one which affects railway and canal companies very seriously indeed.

It was freely admitted by counsel that no obligation was imposed upon this railway company by any of its special Acts either to make, or, having made, to maintain, this branch railway from Wednesbury to the main line at James Bridge. The language of the statute, 18 & 19 Vict. c. clxxv., which empowered the company to make the branch in question, is in the usual form, that "subject to the provisions in this Act contained, the company may make and maintain the railways hereinafter mentioned with all necessary works and conveniences connected therewith." Whatever obligation the company were under in this respect was imposed upon them by the Railway and Canal Traffic Act, 1854, only. By the definition (s. 1) "railway" as used in the Act, includes "every station of or belonging to such railway used for the purposes of public traffic." Sect. 2 is the section which is supposed to oblige the company to re-open the station in this

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case. I will read it shortly, introducing the words I have quoted from the definition: "Every railway company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways, including every station of or belonging to such railway used for the purposes of public traffic." Now, no doubt these words are imperative. They were intended to impose upon railway companies an obligation which either did not exist or was imperfect before, and the Act provides a summary mode of enforcing that obligation—a jurisdiction which is now vested in the Railway Commissioners. If the company do not give the reasonable facilities made obligatory by this Act, the Railway Commissioners may require them to do so on a summary application for the purpose. But what are the reasonable facilities intended? If the company never made the branch railway at all, could the commissioners compel them to do so? It was decided in *Reg.* v. *York and North Midland Ry. Co.* in 1852 (1), and in 1853, in the Exchequer Chamber (2), that a railway company under such words as are used in the special Act in this case is not under any obligation, contractual or otherwise, to make the line, although if the words in the special Act are imperative, as in *Rex* v. *Severn and Wye Ry. Co.* (3), it was held otherwise. In *Scottish North Eastern Ry. Co.* v. *Stewart* (4), the decision in *Reg.* v. *York and North Midland Ry. Co.* (1) was cited, and approved by Lord Wensleydale in the House of Lords. This decision was before the Act of 1854. It can hardly be argued that this statute made it compulsory to make the railway. In *Reg.* v. *Great Western Ry. Co.* (1893) (5), it was decided that where the special Act contained only the usual permissive words, a railway company could not be compelled by mandamus to reinstate a part of their line which had been let down and destroyed by working the minerals underneath it. The ground of that decision was that the company was under no obligation to maintain the line, and therefore could not be compelled to reinstate it. Bowen, L.J., said: "It must be admitted, after the decisions in

(1) 1 E. & B. 178.
(2) 1 E. & B. 858.
(3) 2 B. & A. 646.
(4) 3 Macq 382.
(5) 62 L. J. (Q.B.) 572.

the House of Lords and in the Exchequer Chamber, that there is no obligation on the railway company to make the line. The applicants can only get the obligation to reinstate, if at all, out of a supposed obligation to maintain the line after it is once made. They cannot ask for a mandamus directing the railway company to maintain the line; but they say that if there is an obligation to maintain it that involves an obligation to reinstate it if it is destroyed. No doubt if there were an obligation to maintain there would be an obligation to reinstate; but in order to get the duty to reinstate, one must find the duty to maintain." It was suggested in the argument in the present case that the statute of 1854 was overlooked in that case, because no reference to it appears in the judgments. But the statute was referred to in the judgment of the Divisional Court from which the appeal was brought, and if no argument upon it was raised in the Court of Appeal, it must have been because such argument would have been useless. I am clearly of opinion that if a railway company is not bound by its special Act to make or maintain the railway, no such obligation is imposed upon it by the Act of 1854.

But there is another decision of the Court of Appeal which bears still more closely upon the present case—I mean the *South Eastern Ry. Co.* v. *Railway Commissioners.* (1) The short effect of that decision is, that a railway company cannot be compelled to make a station where there was not one before, nor to direct that imperfections in an existing station shall be remedied by specific alterations prescribed by the commissioners. The Lord Chancellor (Lord Selborne) said, in giving judgment (p. 592): "A company may carry or not upon its own line as it thinks fit; and if it does so, may undertake that business under various conditions and limitations. But, if and so far as it does undertake so to carry either passenger or goods traffic, it comes, in my opinion, under the obligation to afford, for the purposes of that traffic, the facilities required by the first branch of the 2nd section of the Act. With respect to stations, there is no obligation to establish them at any particular place or places unless the company thinks fit to do so. The railway (as interpreted by the Act) only includes existing stations 'used for the purposes of

(1) 6 Q. B. D. 586.

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public traffic.' But when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for the purposes of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage, or delivered there after carriage, it is, in my opinion, bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for 'receiving,' 'forwarding,' and 'delivering' such passengers and goods." His Lordship then proceeds to say that a general order to give increased facilities at an existing station would not necessarily be beyond the commissioners' jurisdiction because it would incidentally be requisite, in order to obey it, to make some structural alterations; but that the commissioners have no authority by ordering particular works to be done to control the discretion of the company as to the best means of fulfilling their statutory obligations. The commissioners seem, from their judgment in the present case, to have been considerably embarrassed by that authority. First they say that much might be urged against it; then they distinguish the case of opening a new station from closing one "for which there is an existing public need." But the question before the commissioners was not of closing the Darlaston Station. That had been done years before, and an order to re-open it was so very like an order to open a new station, that I do not wonder that the case was found difficult to distinguish.

A railway company is a corporation formed for the purpose of carrying on a business for the sake of profit. In consideration of the probable benefit to the public, they have extraordinary powers, such as taking the land they require compulsorily. Generally speaking, however, the legislature has carefully avoided putting them under any obligation which might involve pecuniary loss. They are not bound to make, or, having made, to maintain, the line of railway. That they will do so whenever there is a reasonable expectation of profit is thought so probable that no legislative obligation is imposed upon them. But then it was necessary to put such companies under some control, and this was done by the Railway and Canal Traffic Act, 1854. That

statute does not enact that railway companies shall make the lines they are authorized to make, or shall maintain them when made. The purpose of it seems to me to fall far short of these objects. While a railway is in existence, and is being worked, questions may arise as to whether reasonable facilities are being afforded for traffic of one kind or another at a particular part of the line, and whether undue advantages are being given to some persons at the expense of others. These questions the commissioners may solve, always bearing in mind that, where it is a question of reasonable facilities, they must be reasonable as regards the company as well as the public concerned. It would require very clear and explicit words in the Act to bring me to the conclusion that it was intended to enable the commissioners to determine whether any part of the line was to be constructed or maintained, or the spot at which a station should be placed. I find nothing in the statute about any of those matters.

It is not necessary to the present decision to hold that in no possible circumstances could the commissioners have jurisdiction to prevent the closing of an existing station. It is difficult to conceive that any company would do this where there was a chance of profit by keeping it open. But every such case must depend upon its particular circumstances.

I am clearly of opinion in the present case that the company were not bound to keep open the Darlaston Station or to run passenger trains over the Darlaston branch at a loss, and that the company did not act illegally, under the circumstances, in closing that station. The order of the commissioners is intended to compel the railway company to re-open that station, and I am of opinion that it was beyond their jurisdiction to make the order in this case to compel them to do so.

A. L. SMITH, L.J., read the following judgment. Two questions arise upon this appeal, and they undoubtedly are of great importance. The first is, whether a railway company which has built and opened a station upon its line for public traffic can, at its own will and pleasure, close it and pull it down; the second is, whether, having done so, the company can be compelled by the Railway Commissioners to rebuild and re-open it.

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The short facts are as follows: For some twenty-four years prior to October, 1887, the defendant company had run trains over its branch line to and from the old Darlaston Station thereon. It was found by reason of tramways being constructed, and other alterations in the neighbourhood, that passenger traffic at this station could no longer be worked at a profit, and in 1887 the company ceased to run passenger trains over this branch, and shut up the station, and in 1889 dismantled and pulled it down. The company continued to run through goods trains over the branch. Some five years afterwards application was made to the Railway Commissioners by the local board of Darlaston for an order directing the railway company, in substance, to rebuild the station and run passenger trains in conjunction therewith.

The Railway Commissioners found that passenger traffic to and from the Darlaston Station could only be worked at a loss to the company, but nevertheless made an order, which though in form an order commanding the company to afford reasonable facilities for receiving and forwarding and delivering passenger traffic upon and from the said railway, was in substance an order to rebuild a station at Darlaston, and to re-open it for passenger traffic, for it was only by so doing that the order could be complied with. The question is, Had the commissioners power to do this? It is clear that, apart from the Railway and Canal Traffic Act, 1854, where the words of an Act of Parliament by which a railway company is empowered to make a railway are enabling, as they are in the present case, and not obligatory, no obligation is imposed upon the company to make the contemplated line or any part of it, or any station connected therewith. At one time it was thought otherwise; but this opinion was controverted first by Erle, J., in his judgment in the year 1852 in *Reg.* v. *York and North Midland Ry. Co.* (1), and was finally exploded in the next year in the Exchequer Chamber (2), which affirmed the judgment of Erle, J. Lord Wensleydale subsequently, in the House of Lords, in *Edinburgh, Perth, and Dundee Ry. Co.* v. *Philip* (3), spoke of this case as follows. He said: "Now it has been clearly settled, though in the first instance there was some

(1) 1 E. & B. 178. (2) 1 E. & B. 858.
(3) 2 Macq. 514, at p. 526.

doubt about it, that these enabling Acts are not compulsory. It was solemnly decided by the Court of Error, of which I formed a part, in a case in which the judgment was delivered (and an excellent judgment it was) by the late Chief Justice Jervis, that permissive words in an Act of Parliament are not obligatory."

It appears to me obvious if an Act is enabling, so as to impose no obligation to make, it imposes no obligation to maintain, though apart from the Act if a company desires to open and keep open its line and stations, and does so, for public traffic, it must whilst so doing maintain its line and stations. Apart, therefore, from the Railway and Canal Traffic Act of 1854, the defendants were under no obligation to keep open the old Darlaston Station in the year 1887. That Act, however, has undoubtedly imposed obligations upon railway companies which had not theretofore existed, and gave the Court of Common Pleas, now represented by the Railway Commissioners, jurisdiction to enforce them, and it becomes necessary to examine the Act to see what these obligations are.

This Act, which is called an Act for the better regulation of the traffic on railways and canals, recites that it is expedient to make better provision for regulating the traffic on railways, which includes passengers and their luggage and goods, animals, and other things conveyed by a railway company, and it then enacts by s. 2, which is the material section in this case, that every railway shall (this is obligatory) according to its powers, firstly, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon its railway, and from every station of its railway used for the purposes of public traffic; and secondly, shall not give undue preference in favour of any particular person or description of traffic; and thirdly, shall afford all due and reasonable facilities for receiving and forwarding all traffic arriving by one railway which forms part of a continuous line of railway with itself. It also provides by s. 7 that the only condition the company may impose as regards the carriage of goods is such as shall be adjudged to be just and reasonable. I can find nothing in this Act which either imposes an obligation upon a railway company to make the whole or any part of its line which it does not desire to make, or which obliges

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a company to build any station which it does not desire to build, and I cannot doubt that this Act of 1854 does not impose either of these obligations upon a company under the obligation to afford all reasonable facilities for receiving and forwarding and delivering of traffic, and that this is the opinion of Lord Selborne and Lord Esher will be seen upon reading Lord Selborne's considered judgment at p. 592, and Lord Esher's at p. 600 in the case of the *South Eastern Ry. Co.* v. *Railway Commissioners.* (1) But it is said that even if so, where a company has made and uses for public traffic the whole or any part of its line, or has built and uses for such traffic any stations thereon, the Act of 1854 has by the words above mentioned imposed the obligation upon the company to maintain and use such line and stations so long as such maintenance and user is necessary for affording reasonable facilities, and that if the company does not do this it fails according to its powers to afford the reasonable facilities mentioned in the Act, and this is how it is put by the applicants. It is not denied on the part of the defendant company that so long as a railway company is working its line with its stations thereon for public traffic upon that line, and from and to those stations, the company is bound to afford the facilities mentioned in the Act; but they deny that there is to be found therein an obligation upon a railway company to continue to maintain and use either the whole or any part of its line, or the whole or any of its stations, in order to afford such facilities if it does not desire to do so. They do not deny jurisdiction in the commissioners to order the proper facilities to be given at the stations which are in public use, but they do deny their jurisdiction to order the company to keep all or any part of its line, or all or any of its stations, open for public traffic.

In construing this Act of 1854, it must not be forgotten that just fifteen months prior to its being passed the Exchequer Chamber, by the unanimous judgment of nine judges, had held, that under an Act enabling a company to make a line, the company was under no obligation to make it or any part of it, and it seems to me necessarily to follow from this, as before stated, that under such an Act a railway company is under no obligation to

(1) 6 Q. B. D. 586.

maintain or keep open what it may happen to have constructed. It is, however, said on behalf of the applicants, that with this decision before it the legislature, by the language it has used in s. 2 of the Act of 1854, has shewn that it intended to compel and has compelled every railway company thereafter to maintain and keep open any works it may have made and used for public traffic, so long as such works, or any of them, might be necessary for affording all reasonable facilities for receiving, forwarding, and delivering traffic upon and from its railway.

Now, what are the words which are said to have wrought this great change, and cast this onerous obligation upon the railway companies? They are these: "Every railway company shall, according to its powers, afford all reasonable facilities for the receiving and forwarding and delivering of passengers and their luggage and goods, animals, and other things conveyed by any railway company upon its railway, and from every station of or belonging to the railway used for the purposes of public traffic." It will be seen that there is not a word in this section about the railway company maintaining or using its railway or stations in whole or in part, or rendering the facilities named for any defined or, indeed, for any period at all; the period for which a line is to be maintained and used is left precisely where it was before the Act of 1854 became law—the obligation imposed by the Act of 1854 is that "the company shall according to its powers afford all reasonable facilities." But for how long? The applicants contend that the company must do so for as long as these facilities are required by the public; but where is this to be found in the Act? There are no words to this effect; and, indeed, the words which are there are opposed to this contention—namely, the words, "used for the purpose of public traffic."

In my judgment, the true answer to be given to the question, "For how long?" is, that a railway company is placed under obligation by the Act of 1854 to afford the reasonable facilities for just so long as, when the Act was passed, it was under obligation to maintain and use its line and stations, and for no longer, which is for so long as it desires to keep open and does keep open its line and stations for public traffic. So long as the company does this it must maintain those parts which it desires to

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keep open and is keeping open, whether they be the whole or only parts of its undertaking, in such a state as to afford the reasonable facilities mentioned in the Act. This, in my opinion, is what the Act of 1854 enacted, especially when taken in connection, as it must be, with the law as it stood at the time it was passed. If the legislature was imposing the onerous and novel obligation upon a railway company to maintain its works for some period other than it was then bound to do, some apt words certainly would be found in the Act imposing this obligation, and yet the Act is altogether silent upon the subject, though other words are now said to bear that meaning, and are pressed into the service to do duty for those which cannot be found.

I am aware of what has been urged on the respective sides as to the convenience or inconveniences which may arise from one or other construction of the statute. On the one side (i.e., the side of the public), it is said—if this Act of 1854 is not to be read as imposing an obligation upon a railway company to keep its line and its stations open so long as such keeping open affords a reasonable facility, what a disadvantage it will be to the public, and how unreasonable it is not to construe the Act in such a way as to oblige the company to keep its works open for the convenience of the public, and indeed Sir F. Peel, in the case of *Winsford Local Board* v. *Cheshire Lines Committee* (1), said that unless s. 2 of the Act of 1854 was so read, railway companies would be able to make the section practically a nullity. The answer given to this is, that it is not the general habit of railway companies for the sake of spiting their customers to discontinue traffic which self-interest prompts them to continue, and it is said that it is unreasonable that they, who are trading companies carrying on business in the interests of their shareholders, should be compelled against their wills and against their own interests to go on carrying for the public, especially when the public do not provide the requisite traffic to enable the company to carry on its business otherwise than at a loss.

The balance of these conveniences or inconveniences appears to me to be about equal; but be this as it may, they throw no real light upon the true construction of the Act. I can find nothing

(1) 24 Q. B. D. 456, at p. 461.

in the Act of 1854 to lead me to the conclusion that an obligation is thereby cast upon a railway company to maintain and use its line, or any particular part of its line, or all or any of its stations, if it does not desire to do so. The case of *Reg.* v. *Great Western Ry. Co.* (1) has a material bearing upon the obligation of railway companies to maintain and keep open their railways, and is in accord with what I have above written, and I must point out that, although the case of the *South Eastern Ry. Co.* v. *Railway Commissioners* (2), which was decided upon the Act of 1854, was cited and dealt with by Lord Coleridge in the Court below, neither this Act nor the *South Eastern Case* (2) appears to have been cited in this Court, and the learned counsel for the appellant did not then even suggest the construction now sought to be placed upon the Act of 1854.

The passage in the judgment of Lindley, L.J., in *Dickson* v. *Great Northern Ry. Co.* (3), so much relied upon by the applicants, does not apply to the present case. The Lord Justice points out that the Act of 1854 materially altered the law, in respect of affording reasonable facilities for receiving, forwarding, and delivering traffic, and this undoubtedly is true; and he points out the duty thus imposed was inconsistent with the company's right to refuse to carry any particular class of goods which they have facilities for carrying; but no question was in that case raised as here as to whether a railway company could rightly close its line or stations, or part of its line or any particular station, to public traffic. What the Lord Justice was dealing with was a company which was using its railway and stations for public traffic, and what he said was that under these circumstances it would not be affording reasonable facilities to refuse to carry any particular class of goods which the company had facilities for carrying.

I find a strong expression of opinion by Lord Selborne, when Lord Chancellor, in *South Eastern Ry. Co.* v. *Railway Commissioners* (4), as to the construction of the Act of 1854. He states: "A company may carry or not upon its own line as it thinks fit; and if it does so, may undertake that business under

(1) 62 L. J. (Q.B.) 572.
(2) 6 Q. B. D. 586.
(3) 18 Q. B. D. 176, at p. 185.
(4) 6 Q. B. D. 586, at p. 592.

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various conditions and limitations. But, if and so far as it does undertake so to carry either passengers or goods traffic, it comes, in my opinion, under the obligation to afford for the purposes of that traffic the facilities required by the first branch of the 2nd section of the Act."

For the reasons above, my opinion is that the Act of 1854 does not compel a railway company to go on maintaining and using its railways or stations either in whole or in part, even though by so doing it would afford reasonable facilities for public traffic, and that the defendant company was within its rights in closing its station as it did in 1887, and in ceasing to carry passengers over its branch line, and in subsequently pulling down the station.

But there is the second point, which, I think, equally fatal to the applicants. The passenger traffic was stopped in 1887 to the knowledge of the applicants, and so matters rested till 1892, with the exception that in the meantime the company pulled down its station. The difficulty may be masked by making an application in the verbiage of the Act, and by granting an order in that form; but the real case must be looked at, which is, that the applicants are asking the Railway Commissioners to order that the company should rebuild a station at or about the old site and commence passenger traffic thereon, and that is the real object sought to be attained.

Even if the company could not have shut up its station in 1887, though, as I have stated, I think it could, there is no jurisdiction in the commissioners under the circumstances which exist now to order a station to be built, which is in reality the order now appealed against, for that must be done if the applicants are to derive any advantage from their application. The case of the *South Eastern Ry. Co.* v. *Railway Commissioners* (1) is a conclusive authority that a new station cannot be ordered by the commissioners.

In conclusion, I will say that if the public are to be empowered to impose upon a railway company the obligation to maintain and keep its works open, and if those motives of railway companies "which do not appear upon the surface," which are alluded

(1) 6 Q. B. D. 586.

to by Wills, J., exist, and are to be frustrated, this must be done by an express enactment, and not by an attempt to extract from words such as are in the 2nd section of the Act of 1854, a meaning which, when the Act and its history is understood, they do not and, in my judgment, cannot bear.

In my opinion, this appeal should be allowed.

Appeal allowed, and order made that the application to the Railway Commissioners be dismissed.

Solicitors for applicants: *Ullithorne, Currey, & Villiers, for J. Corbett, Darlaston.*

Solicitor for railway company: *C. H. Mason.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.
1894
July 4.

THE ROYAL BANK OF SCOTLAND *v.* TOTTENHAM.

Cheque — Post-dated Cheque—Admissibility in Evidence—Stamp Act, 1891 (54 *&* 55 *Vict. c.* 39), *ss.* 4, 38—*Bills of Exchange Act,* 1882 (45 *&* 46 *Vict. c.* 61), *ss.* 13, 73.

A post-dated cheque, stamped as a cheque, is admissible in evidence in an action brought, after the date of the cheque, by the holder, since, under the Stamp Act, 1891, the test of admissibility is whether the instrument appears, when tendered in evidence, to be sufficiently stamped.

Gatty v. *Fry* (2 Ex. D. 265) approved.

MOTION to set aside or vary a judgment for the plaintiffs.

The action was brought against the defendant as drawer of a cheque for 250*l.*, dated August 10, 1893, drawn by the defendant to the order of Cecil Hambrough and indorsed by him, of which the plaintiffs were holders, and which was dishonoured.

The cheque though dated August 10, 1893, was drawn by the defendant and forwarded to Hambrough on August 3. The cheque was handed by Hambrough to Mrs. Monson, and sent by her to the plaintiffs on August 7; and on the 8th it was received by the plaintiffs and placed, according to instructions, to her credit. On August 10 and 11 Mrs. Monson drew cheques, the amount of which was debited against her account in the books of the bank. The defendant gave notice to his bankers on

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August 10 to stop the cheque; and on August 11 the plaintiffs received notice from their London office reporting non-payment of the cheque on presentation. Upon receipt of this letter the manager debited Mrs. Monson's account with 250*l.*, making her a debtor to the bank for 137*l.*, which was the amount which had been paid by the bank on the faith of the cheque being met, and before notice of dishonour. The cheque was presented again, but dishonoured, and after a demand on the defendant for payment this action was brought.

The action was tried before Wills, J., who decided that directly the bank had entered the cheque to Mrs. Monson's credit, and communicated the fact to her, they acquired a good title to the cheque, and that the cheque was not the less negotiable because it was post-dated. Judgment was accordingly given for the full amount of the cheque.

The defendant appealed.

Channell, Q.C., and *Montague Lush*, for the defendant. The utmost that the bank can say is, that they are agents for Mrs. Monson in so far as they have given her credit, and the drawer's defence would be good for the balance: *Thornton* v. *Maynard.* (1) A post-dated cheque is not a negotiable instrument, and gives no title to the transferee. A cheque, by s. 73 of the Bills of Exchange Act, 1882, is a bill of exchange drawn on a banker payable on demand. If not payable on demand, a bill of exchange must bear an ad valorem stamp; and by s. 38 of the Stamp Act, 1891, a person who takes a bill of exchange not duly stamped is not entitled to recover thereon. This post-dated cheque was a bill of exchange at so many days as intervened between the day of delivering the cheque and the date on it: *Forster* v. *Mackreth* (2); and, consequently, it could not be sued on. It is true that by s. 13, sub-s. 2, of the Bills of Exchange Act, 1882, a bill of exchange is not invalid by reason only that it is post-dated; but that is not inconsistent with the requirements of the Stamp Act. Thus, a post-dated bill purporting to be payable on demand, but properly stamped with an ad valorem stamp, could be treated as a bill payable at a future date, and

(1) Law Rep. 10 C. P. 695. (2) Law Rep. 2 Ex. 163.

would not be invalid merely because it was post-dated. *Gatty* v. *Fry* (1) was not rightly decided, for the law as subsequently declared in s. 13, sub-s. 1, of the Bill of Exchange Act, 1882, was overlooked. By that sub-section the date on a bill is to be treated as the true date unless the contrary is proved; so that it is clear that post-dating may be proved. The effect of that case was limited in *Clarke* v. *Roche.* (2) The bank took this cheque, which was not a negotiable instrument, and they took the risk of being unable to recover upon the cheque; so that their remedy is against Mrs. Monson, and not against the defendant. [They cited *Emanuel* v. *Robarts* (3); *Misa* v. *Currie.* (4)]

R. M. Bray, (*J. F. P. Rawlinson,* with him), for the plaintiffs. The fact of placing the cheque to Mrs. Monson's credit is sufficient consideration as between the bank and her: *Ex parte Richdale* (5); and nothing that the bank has done has affected their property in the cheque and their right to recover on it. Even if the judgment of Wills, J., on the stamp objection is not taken as final, it was quite right, because the judge has only to deal with the purport and effect of the cheque on the face of it.

[He was then stopped.]

Channell, Q.C., in reply.

LORD ESHER, M.R. The first point that arises on the law relating to cheques is that, in order to recover, the plaintiff is only bound to produce the cheque and prove the signature. When that is done, the person who signed it must pay unless he can prove a legal defence. One defence in this case is that the bank gave no consideration for the cheque; but this point is determined against the defendant by the decision of the Court of Appeal in *Ex parte Richdale.* (5) When the bank received the cheque from Mrs. Monson, they did so on an undertaking to give her credit to the amount of the cheque on her general account. This they did, and giving such credit is sufficient consideration as between a bank and a customer. Consequently the bank were holders for value.

(1) 2 Ex. D. 265.
(2) 3 Q. B. D. 170.
(3) 9 B. & S. 121.
(4) 1 App. Cas. 554.
(5) 19 Ch. D. 409.

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The only other defence raises the question whether the cheque was payable on demand. It is dated August 10, and there is nothing on the face of it to shew it is not payable on demand. Then it is said the true circumstances were, that the cheque was signed on August 3, and handed to the bank on the 8th, and that the judge is bound, on this being proved, to say that it was not from the beginning payable on demand, and that when it reached the bank it was payable two days after issue. This, it is contended by reason of the provisions of s. 38 of the Stamp Act, 1891, makes the cheque invalid, so that the person who took it would not be entitled to recover thereon. On the other hand, s. 13 of the Bills of Exchange Act, 1882, says that a cheque shall not be invalid by reason only of its being post-dated. The construction which it is sought to put on the Stamp Act would make a conflict between the two Acts; but I do not think this conflict arises. Questions under the Stamp Act must be determined by the conditions existing when the question is raised. An objection to a stamp has to be determined by the judge at the trial, and a stamp objection to a cheque, which is otherwise in order, that it was post-dated, could only be taken if the action comes on before the date on the cheque.

I think, therefore, the appeal should be dismissed.

KAY, L.J. This is an action on a cheque, of which the plaintiffs claim to be holders. That they are holders is clear from the judgment of the House of Lords in *Foley* v. *Hill* (1), where Lord Cottenham says: "Money placed in the custody of a banker is, to all intents and purposes, the money of the banker." The Bills of Exchange Act, 1882, by s. 27 defines valuable consideration as any consideration sufficient to support a simple contract; and it was decided in *Ex parte Richdale* (2), in this Court, that where a customer pays a cheque to his bankers with the intention that the amount of it shall be at once placed to his credit, and the bankers carry the amount to his credit accordingly, they become immediately holders of the cheque for value. It follows that the plaintiffs were holders for value of this cheque, and the only question that remains relates to the post-dating of the

(1) 2 H. L. 28. (2) 19 Ch. D. 409.

cheque. It is said that under the Stamp Act, 1891, it was not sufficiently stamped, and could not be sued on. The Bill of Exchange Act, 1882, expressly says that a post-dated cheque is not for that reason only invalid. The point whether a post-dated cheque is admissible in evidence in an action brought after the date of the cheque was considered in *Gatty* v. *Fry* (1), which was followed in *Hitchcock* v. *Edwards.* (2) Though those decisions are not binding on this Court, I am of opinion that they are right, and that there is no conflict between the Stamp Acts and the Bill of Exchange Act, and that the test of admissibility was rightly laid down to be whether the instrument appears, when tendered in evidence, to be sufficiently stamped. The previous Stamp Acts dealing with this matter were swept away by the Stamp Act, 1870, the provisions of which are repeated in the Stamp Act, 1891; and in those Acts there is nothing which relates to post-dated cheques. The objection under the Stamp Act cannot be maintained, and does not prevent the plaintiffs from recovering in this action. It is said that the bank have been to some extent paid because they debited the cheque in Mrs. Monson's account; but it is impossible to set up that the debiting of a customer by a bank amounts to a payment to them. I come, therefore, to the conclusion that the bank are entitled to recover the full amount of the cheque, and that the appeal must be dismissed.

A. L. SMITH, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Minet, Harvie, Smith, & May.*
Solicitors for defendant: *P. J. Gordon & Son.*

(1) 2 Ex. D. 265 (2) 60 L. T. (N.S.) 636.

A. M.

C. A.
1894
July 12.

[IN THE COURT OF APPEAL.]

PHARMACEUTICAL SOCIETY *v.* ARMSON.

Pharmacy Acts—Sale of Poisons—Medicine containing a Scheduled Poison—Patent Medicine—Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 2, 15, 16, 17.

The prohibition in s. 15 of the Pharmacy Act, 1868, against the sale of poisons by other than registered chemists, is not confined to the sale of the scheduled poisons in their simple state, or of preparations of such poisons, but extends to the sale of a compound containing a scheduled poison as one of its ingredients.

The exception in s. 16 of the Act, as to the making or dealing in patent medicines, does not extend to proprietary medicines.

Pharmaceutical Society v. *Piper & Co.* ([1893] 1 Q. B. 686) approved.

APPEAL from a judgment of the Queen's Bench Division, dismissing an appeal from a county court judge.

The particulars of demand annexed to the summons stated that the action was brought to recover a penalty of 5*l.* "incurred by the defendant in keeping open shop for retailing, dispensing, or compounding of poisons, to wit, morphine or a preparation of opium contained in and forming part of an article called Powell's Balsam of Aniseed, contrary to the provisions of the Pharmacy Act, 1868. (1)

(1) By 31 & 32 Vict. c. 121, s. 1, it is made unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, unless he is a pharmaceutical chemist, or a chemist and druggist within the meaning of the Act, and is registered under the Act. Poisons are defined in s. 2 as the several articles named in Sched. A, part 2 of which includes "opium, and all preparations of opium or of poppies."

Sect. 15 imposes a penalty of 5*l.* for each offence, recoverable in the manner provided by the Pharmacy Act, 1852.

By s. 16: "Nothing hereinbefore contained shall extend to or interfere with the business of any legally qualified apothecary . . . . nor with the making or dealing in patent medicines, nor with the business of wholesale dealers in supplying poisons in the ordinary course of wholesale dealing."

By s. 17: It shall be unlawful to sell any poison, either by wholesale or by retail, unless the box, bottle, vessel, wrapper, or cover in which such poison is contained, be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison of those which are in the first part of Sched. A to this Act, or may hereafter be added thereto under s. 2 of this Act, to any person unknown to the seller, unless introduced by

It was proved that the defendant, who was a grocer at Milbourne, and not a registered chemist, sold a bottle of this compound which contained nearly an ounce of fluid, which, upon analysis, was found to consist, among other ingredients, of one-tenth of a grain of morphine, which is the chief medicinal property of opium, and is in its pure state a dangerous poison. Sched. A of the Act contains, among the list of poisons, "Opium and its preparations." The county court judge in his judgment dealt with the effect of the compound under certain circumstances thus: "It was said indeed that it might be fatal to an adult suffering from certain diseases, but except under these special conditions, I do not think that the evidence established that the contents of the bottle, if taken at once, would ordinarily be fatal or even injurious to adult life. In the case of children, however, it was stated in the evidence given on behalf of the plaintiffs, that if the whole contents of the bottle were taken at once by a child in ordinary health it would certainly be injurious and might be fatal, and to an infant very probably fatal. This evidence was not contradicted or seriously impugned by the witnesses called for the defence, and in my opinion I ought to accept it as true." The learned judge thereupon gave judgment for the plaintiffs, and his judgment was affirmed on appeal by the Divisional Court, Charles and Bruce, JJ., who gave leave to appeal.

The defendant appealed.

some person known to the seller; and on every sale of any such article the seller shall, before delivery, make or cause to be made an entry in a book to be kept for that purpose stating, in the form set forth in Sched. F to this Act, the date of the sale, the name and address of the purchaser, the name and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser, and of the person, if any, who introduced him shall be affixed." The section then imposes a penalty for sales contrary to its provisions, and enacts that none of its provisions shall apply "to any medicine supplied by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act; provided such medicine be labelled in the manner aforesaid with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose."

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Moulton, Q.C., and *Bonsey*, for the defendant. The Act does not apply to a compound of which one ingredient is a scheduled poison. Such a compound is not a preparation of the poison, in which the substance remains the same. What must be looked at is the thing sold in its ultimate form, and if that ultimate form is one of the named poisons the Act applies. There are numberless things which are not named in the Act but are poisonous, but not so poisonous that small quantities will produce death, and they are not within the mischief aimed at by the Act. So a poison named in the Act, but dealt with in such small quantities as not to be dangerous is not within the Act. The object of the Act was to insure skill on the part of the vendors of poison, but no skill is required in selling proprietary medicines. The Stamp Acts require that the bottles should be made up in wrappers which are stamped, and they reach the hands of the seller in that state. He cannot know what the contents are, or make any alteration, but he sells the medicine in the state in which it reaches his hands. If a proprietary medicine containing a poison is within the Act, it will be impossible to sell it, however beneficial it may be, for the chemist could not comply with the provisions of s. 17 on each sale, nor would he know the quantity of poison sold. In *Pharmaceutical Society* v. *Piper* (1) the Court tried to avoid this difficulty by giving a different meaning to the word "article" in the last part of the section from that given to it in the first. It is submitted that this was not correct and that that case was wrongly decided.

Such a sale as that in the present case, is a sale of a patent medicine within the 16th section. If there are any patent medicines the number must be very small, and, in a popular sense the expression means a proprietary medicine. This popular usage arises from the use of the revenue stamp, without which such medicines cannot be sold.

[They cited also *Pharmaceutical Society* v. *Delve*. (2)]

Crump, Q.C. (*T. R. Grey*, with him), for the plaintiffs. The distinction between medicines sold under the authority of letters patent and what are generally termed proprietary medicines is carried through all the Stamp Acts dealing with such medicines

(1) [1893] 1 Q. B. 686. (2) [1894] 1 Q. B. 71.

as for instance, 25 Geo. 3, c. 79, s. 4; 44 Geo. 3, c. 98, and the exemption in the schedule to 52 Geo. 3, c. 150, and in the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6. The scope of the Act, as was held in *Berry* v. *Henderson* (1), was to include all medicines containing the scheduled poisons.

[He was stopped.]

Bonsey, in reply.

LORD ESHER, M.R. I think this appeal must be dismissed. It is an appeal against the decision of the Divisional Court, which determined an appeal from the county court judge. With regard to any fact in the case, we are not authorized to depart from the finding of fact found by the county court judge. We must take it, therefore, that in the article which was sold by the defendant in this case, there was one of the poisons named in the schedule to the Act of 1868. We do not know what the other ingredients in this bottle were, but we know that one of the ingredients was one of the poisons named. The Court has held that the defendant has made himself liable to the penalty named in the Act by selling this phial of medicine, because he was not one of the persons who are entitled to sell a poison; he was a grocer—he was not a pharmaceutical chemist. Now, arguments have been addressed to us on two points. It is said that the defendant did not sell a poison mentioned in the schedule, because, though nothing has been done to it which alters its chemical nature, it has been mixed with other things. Does that, in ordinary language, make it not poison? Does poison put into a bottle of wine cease to be a poison? Or does poison put into a cup of tea cease to be poison? It is clear that when poison is put into a medicine, and a person sells the medicine, he sells the poison that is in it. There is nothing in the Act of Parliament that I can see, reading it in its ordinary language, which says that you may sell a poison mixed with other things, though you may not sell poison by itself. Collins, J. (2), for reasons which he gives, came to the conclusion that I have come to—viz., that you sell poison, if you sell it without its nature

(1) Law Rep. 5 Q. B. 296.

(2) *Pharmaceutical Society* v. *Piper & Co.*, [1893] 1 Q. B. 686.

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being altered, although you sell it mixed up with other things. I cannot see any answer to that view. I cannot appreciate the sufficiency of the argument against it, and, therefore, I think that this person did sell poison. Then we are, of course, met with the "infinitesimal" argument. But the meaning of the word infinitesimal, when used in a court of law, is, that a thing is so small that the Court will treat it as not existing at all. The maxim "de minimis non curat lex," when construed into English, means that a matter is so infinitesimally small that the Court will not take any notice of it. That cannot be truly said in this case. Then it is said he is exempt by reason of this that he sold a patent medicine.

It has been said that all proprietary medicines are known by the name of patent medicines. In the first place, I do not accept the statement of fact; and, in the second place, it seems to me wholly immaterial. We have to construe an Act of Parliament. When we find the Act of Parliament, or Acts of Parliament which have been dealing with this very subject-matter, distinguishing between proprietary medicines, secret medicines, and patent medicines, and when you come to this Pharmacy Act and find that it has in terms dealt with only one of those phraseologies—viz., patent medicines—it is clear to my mind that, construing the exemption according to ordinary canons of construction, we must say that it applies only to patent medicines, using that term in the sense of medicines for which a patent has been procured under the Great Seal. On both points I agree entirely with Collins, J.'s, judgment in the *Pharmaceutical Society* v. *Piper* (1), which is, as to one of these points, founded upon *Berry* v. *Henderson* (2), decided by Lush, J., and Hannen, J. We must overrule both those cases in order to allow this appeal. We could, of course, overrule them; but I am of opinion they are both right, and that this appeal must be dismissed.

KAY, L.J. The Pharmaceutical Society in this case have brought an action against the defendant, who is not a chemist—not one of the persons authorized to sell poisons under the 31 & 32

(1) [1893] 1 Q. B. 686. (2) Law Rep. 5 Q. B. 296.

Vict. c. 121—and the society have brought the action for the penalty which is imposed by the 15th section of that Act.

The facts of the case, so far as material, are these. The thing sold is called balsam of aniseed. What it is compounded of we are not told; but we are told that each bottle contains one-tenth of a grain of morphine, and from what the county court judge said in his finding on the facts, which is conclusive upon us, it is clear that this is not a case in which the maxim "de minimis" applies at all. I can quite understand that, although a case might otherwise be within the Act, if the proportion of one of the poisons mentioned in the schedule were so exceedingly small as to be perfectly innocuous or comparatively innocuous if the whole bottle were taken, then the maxim "de minimis non curat lex" might possibly apply in an action of this kind; but this is not such a case.

Now the first argument was, this is not a sale of morphine, because it is only a sale of a composition which contains morphine. The argument stated in that way seems almost to answer itself; and, on looking at the Act of Parliament which we have to construe, I think it is plain that an argument of that kind cannot be maintained. The Act of Parliament provides that it shall be unlawful for any person to sell poison or to keep open shop for the retailing, dispensing, or compounding of poisons, unless he be a pharmaceutical chemist or a chemist and druggist within the meaning of the Act, and registered under the Act, and conforms to the regulations in the Act. Then s. 2 says, "The several articles named or described in the schedule (A) shall be deemed to be poisons within the meaning of this Act." In the schedule to this Act are named, amongst other things, "opium, and all preparations of opium or poppies." Therefore, any body who sells opium, or any preparation of opium or poppies, is selling that which by this Act no one can sell, without incurring a penalty, except a pharmaceutical chemist or a chemist and druggist within the meaning of the Act. The argument that, because this is compounded with something else, therefore it may be sold, really may be reduced to complete absurdity by supposing the composition was made up of two or more of the articles comprised in this schedule. Even without

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taking so extreme a case as that, can it possibly be the meaning of this Act that any one of these prohibited poisons may be sold provided it is mixed up with other ingredients? Such a conclusion would destroy the object of the Act. It seems to me quite impossible to accept that proposition. If the mixture contains the poison in a considerable quantity—such a quantity as to be deleterious if the whole were taken—then it seems to me that it would be infringing not only the letter, but the spirit of this Act of Parliament, if a person may sell that who is not a qualified person within the meaning of the Act.

The other argument was, that this article was excepted by s. 16 because it was a patent medicine. It was said that in ordinary parlance all proprietary medicines are classed under the head "patent medicines." Is that the meaning in this Act of Parliament? In order to construe this Act of Parliament it is material to see how the legislature has dealt with medicines in other Acts of Parliament; and when we look through other Acts of Parliament, we find a most clear distinction always maintained. Although proprietary and patent medicines are classed together for certain purposes, the language of various Acts of Parliament which imposes a stamp duty on medicines mentioned in the schedules shews them to be dealt with as a separate class. On this point I accept what Collins, J., said in the *Piper Case.* (1) The reasons for the exemption seem to me very clear indeed. Where the medicine is, properly speaking, a patent medicine—that is to say, where the exclusive right to make or sell it has been granted to somebody by letters patent under the Great Seal—the condition of the patent always is that a specification should be lodged in the Patent Office describing the whole of the ingredients and the process of manufacture. Therefore, when people buy a patent medicine, they have the means of ascertaining what ingredients are contained in it; and that is one reason, no doubt, for the exemption. Another is this: if a patent of that kind had been granted, it would have been rather hard to take away from the patentee that which he had been exercising as a right under the authority of the Great Seal, and prevent him

(1) [1893] 1 Q. B. 686.

from further making or selling, if he were not an authorized person under the Act. For these reasons, I think it is plain that in s. 16 the words "patent medicine" mean that which they express primâ facie—medicine the maker or owner of which has obtained letters patent for it; the term does not extend, and is not intended to extend, to mere proprietary medicines, or to include a medicine like this, for which the owner or maker has not obtained any patent whatever. On these grounds, I think the decision of the Court is perfectly right, and that this appeal fails.

A. L. SMITH, L.J. This is a proceeding by the Pharmaceutical Society of Great Britain against a grocer, under s. 15 of the Pharmacy Act of 1868, for having sold poison, not being a chemist or a person entitled under that Act to sell poisons. The first question which arises is whether or not he has sold poison within the meaning of the Act. I understand this case is brought for the purpose of overruling, if possible, three cases which have been decided heretofore: the case of *Berry* v. *Henderson* (1), which was decided by Lush and Hannen, JJ., the case of the *Pharmaceutical Society* v. *Piper* (2), which was decided by Collins and Lawrance, JJ., and also the last case which was decided, *Pharmaceutical Society* v. *Delve.* (3) Without going into the authorities which have been cited, speaking for myself, I must say I cannot see much difficulty in construing this Act. The general object of the Act was to have poisons dispensed only by duly qualified persons The articles which only a chemist is allowed to sell are consequently catalogued in the schedule. First there is part 1, in which are the more virulent poisons, beginning with arsenic and prussic acid, and then, in part 2, those which are not so virulent, including opium and all preparations of opium or poppies. It is found as a fact that in this Powell's Balsam of Aniseed which the defendant has sold there is one of the poisons mentioned in the schedule. It is not a matter de minimis—if it were I should hold it as

(1) Law Rep. 5 Q. B. 296. (2) [1893] 1 Q. B. 686.
(3) [1894] 1 Q. B. 71.

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A. L. Smith, L.J.

being equivalent to no poison at all—for there is a scheduled poison in the contents of this bottle which, if taken by a child or an infant in any quantity, would certainly do damage to the taker. Now, I ask myself, has or has not this defendant sold a poison which is mentioned in the Act? I can only answer that question by saying he certainly has. But it is said, "Oh, he did not sell the poison per se, for he sold it together with something else." Supposing a man filled up a bottle half with chloroform, which is one of the prohibited poisons, and the other half with water, and sold it, does he not sell chloroform? Of course he does—he sells chloroform, and he also sells water; and the prohibition is that he is not to sell chloroform unless he be a chemist. It seems to me there is a direct prohibition in this Act against other than legalised persons selling poisons; the present defendant has sold a poison, and is within the meshes of this statute. But then it is said he is out of the meshes by reason of s. 16 of the Act, which provides that none of the prior sections shall extend to the case of "making or dealing in patent medicines," and it is said that Powell's Balsam of Aniseed is a patent medicine within the meaning of the Act. The first thing one asks is, Where is the patent? And the only answer is, There is no patent. How, then, can it be a patent medicine? It is said it is a proprietary medicine, and that we ought to read s. 16, which exempts patent medicines and patent medicines only, as exempting patent medicines and proprietary medicines. I certainly should not read the section in that way myself. The exemption must be read in the manner which the Queen's English dictates; and when the legislation which has taken place before and since this Act of 1868 is looked at, it is abundantly clear that the exception was of patent medicines only and not of proprietary medicines. Looking at the statute of 25 Geo. 3, c. 79, s. 4, and the next Act of 52 Geo. 3, c. 150, s. 2, both prior to this Act of 1868, there is a marked distinction between a patented medicine and a proprietary medicine—that is, a medicine which is compounded of secret nostrums. When we come to the Act of 1868, the sole exception made relates to patent medicines, and a few years afterwards another Act,

relating to the sale of food and drugs, was passed, in which an exception is made where the food or drug is a proprietary medicine, or one which is the subject of a patent in force. This clearly shews that there is a well-recognised distinction between a proprietary medicine and a patent medicine. A doubt was raised whether there was such a thing as a patent medicine; but an answer was speedily given—a specification was handed up in which it was shewn that a patent was taken out for a medicine as late as 1892. In my judgment, this case has been brought within the Act. The defendant cannot get out of it as being within the exemption in s. 16, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Flux, Son, & Co.*
Solicitors for defendant: *Neve & Beck.*

A. M.

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July 16.

EAST LONDON WATERWORKS COMPANY *v.* CHARLES.

Waterworks—Rate—Summons before Justices for Non-payment—Limitation of Time—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 74, 85—*Railways Clauses Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 140—11 & 12 *Vict. c.* 43, *s.* 11.

Sect. 11 of 11 & 12 Vict. c. 43 (which limits the time for making a complaint to six months from the time when the matter of such complaint arose) applies to the hearing of a summons before justices for arrears of water rate under s. 85 of the Waterworks Clauses Act and s. 140 of the Railways Clauses Act; and, therefore, where the sum claimed accrued due more than six months before the date of the summons, the justices have no jurisdiction in the matter.

CASE stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

The respondent, Lennard Charles, was summoned by the appellants, the East London Waterworks Company, to answer the appellants' claim for 6*l.* 12*s.* alleged to be due for water rates chargeable in respect of certain houses, the annual value of each of which did not exceed 20*l.*, and in respect of which the respondent received the rents, and was liable to the payment of any water rates that might be chargeable.

It was admitted that the 6*l.* 12*s.* so claimed by the appellants had become due and had been demanded more than six months before the day on which the summons was issued, and the magistrate held that under those circumstances his jurisdiction was ousted by s. 11 of 11 & 12 Vict. c. 43. (1)

R. M. Bray, for the appellants. Sect. 11 has no application here. The liability of the person receiving the rent of any house not exceeding the annual value of 20*l.* to pay the water

(1) By 11 & 12 Vict. c. 43, s. 11: "And be it enacted that in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

rate chargeable in respect of it arises under s. 81 of the East London Waterworks Act, 1853 (16 & 17 Vict. c. clxvi.). By s. 3 of that Act the Waterworks Clauses Act, 1847, is incorporated, by s. 74 of which the appellants have power to recover the rate "in the same manner as any damages for the recovery of which no special provision is made are recoverable by this or the special Act." Sect. 85 of the Waterworks Clauses Act enacts, with respect to the recovery of damages not specially provided for, "if the waterworks be in England or Ireland the clauses of the Railway Clauses Consolidation Act, 1845, with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act." By s. 140 of the Railways Clauses Act, 1845: "With respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices, be it enacted as follows: In all cases where any damages, costs, or expenses are by this or the special Act, or any Act incorporated therewith, directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices, and if the amount so ascertained be not paid by the company, or other party liable to pay the same, within seven days after demand, the amount may be recovered by distress of the goods of the company or other party liable as aforesaid, and the justices by whom the same shall have been ordered to be paid, or either of them, or any other justice, on application shall issue their or his warrant accordingly." The summons, therefore, is not a "complaint" within the meaning of s. 11 of 11 & 12 Vict. c. 43. The jurisdiction of the magistrate is only to ascertain the amount due and to issue a distress warrant for it. The section ought not to be strained: *Mayer* v. *Harding* (1); and it is clear that it was never intended that it should apply to proceedings under s. 140 of the Railways Clauses Act. By s. 142 of the Railways Clauses Act the justices may proceed in the absence of one of the parties, and, if 11 & 12 Vict. c. 43 applied, they would be able to enforce

(1) 17 L. T. 140.

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their order by imprisonment. The matter is of importance, since by s. 4 of 50 & 51 Vict. c. 21, the power which the water companies had in such cases, under s. 74 of the Waterworks Clauses Act, 1847, of cutting off the supply for non-payment of the rate, is taken away.

Travers Humphreys, (*Bodkin*, with him), for the respondent. The magistrate was right. Sect. 11 of 11 & 12 Vict. c. 43 must be read together with ss. 6 and 35 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). By s. 6: "Where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise"; and by s. 35, an order for the payment of such a civil debt is not to be enforced by imprisonment without proof of means.

This was an order for the payment of a civil debt recoverable on complaint, and therefore s. 11 applies.

The remarks of the judges in *Reg.* v. *Edwards* (1) strongly support this view. It was there held that the determination by justices under s. 24 of the Lands Clauses Act of the amount of compensation to be paid by a railway company to a landowner was not an order for the payment of money within s. 11 of 11 & 12 Vict. c. 43; but s. 24 of the Lands Clauses Act is expressly distinguished in that case from s. 140 of the Railways Clauses Act.

WILLS, J. This is a legal puzzle which has given the Court some difficulty. It arises no doubt from the use of ill-considered words by the draftsman of the Act, and from the fact that he was endeavouring to make applicable to these proceedings a section which was never intended to apply to them. In my opinion the decision of the magistrate was right, and s. 11 of 11 & 12 Vict. c. 43 does apply in the present case.

By s. 74 of the Waterworks Clauses Act, which is incorporated

(1) 13 Q. B. D. 586.

by the East London Waterworks Act, 1853, the undertakers may recover the rate due "in the same manner as any damages for the recovery of which no special provision is made are recoverable." By s. 85, damages not specially provided for are to be recoverable in the manner provided by the Railways Clauses Act, 1845. That sends us to s. 140 of the Railways Clauses Act, which provides: "In all cases where any damages, costs, or expenses are by this or the special Act or any Act incorporated therewith directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount, in case of dispute, shall be ascertained and determined by two justices, and if the amount so ascertained be not paid by the company or other party liable to pay the same within seven days after demand, the amount may be recovered by distress of the goods of the company or other party liable as aforesaid, and the justices by whom the same shall have been ordered to be paid, or either of them, or any other justice, on application shall issue their or his warrant accordingly."

That section, therefore, applies in terms to this case unless there is something in the subject-matter which prevents it from so doing, such as there was in *Reg.* v. *Edwards.* (1) Now, what does that section mean? The first part of it, no doubt, does not expressly say that the justices are to make the order for the payment of the money; but it is clear from the last part of the section that it is assumed that the order can be made and must have been made before the distress warrant can issue. The section could not indeed be satisfied unless the determination of the justices amounted in effect to an order for the payment of the money. The whole object of the section is to provide for the recovery of the amount, and, unless the provision for recovery applies, there is no method of recovery provided by the sections and it becomes absurd and inconsistent with itself. In my opinion, what is meant by the section—although it is no doubt badly expressed—is that the determination by the justices of the sum to be paid does amount to an order to pay the sum. It seems to me that that is the view taken of the section by the Court of Appeal in the case of *Reg.* v. *Edwards.* (1) Although,

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no doubt, the remarks of the judges in that case on this section were not necessary to the decision, they were very germane to the subject-matter then under discussion. They all were clearly of opinion that when s. 140 applies, and the justices have power to determine the amount, they have also power to make an order for payment. That case, therefore, is a strong argument in favour of the view taken by the magistrate. It may be that s. 142 of the Railways Clauses Act also applies; but it is not necessary to consider that in the present case. Whether it applies or not, it does not exclude the operation of s. 140, which, in express terms, is made to apply.

Then arise two other questions, both of which must be answered in the affirmative before the contention of the respondent can succeed. First, is this a "complaint," and, secondly, if it is a "complaint," is it a "complaint" which is to be followed by an order for the payment of money? Whatever doubt there might be prior to 1879, I am clearly of opinion that s. 6 of the Summary Jurisdiction Act, 1879, applies to all classes of proceedings before magistrates. The section divides such proceedings into two classes—proceedings by information, and proceedings by complaint as distinguished from information. The Act specifically provides that civil debts recoverable summarily on complaint are not to be enforced by imprisonment in default of distress, and are not, in fact, to have those awkward consequences which attend proceedings by information. Unless there is some insuperable difficulty in reading the word "complaint" as applying to such proceedings as this, I think that it ought to be applied. There might have been considerable difficulty before the Summary Jurisdiction Act, but I cannot see any such difficulty now since the two Acts are to be read together. In the present case, the water company state before the magistrate that the sum in question is due, and that it has not been paid. That is exactly what a plaint in the county court or a statement of claim in the High Court does. Why is not that a "complaint" within the meaning of the Summary Jurisdiction Acts? Possibly, before 1879 something might be said in support of the contention that it is not a complaint; but since 1879 there can be no difficulty in deciding that

it is a complaint. As I have already pointed out, s. 140 of the Railways Clauses Act gives power by inference to the justices, not only to determine the amount, but to make an order for payment of the money. Therefore I think that the case does fall within s. 11 of 11 & 12 Vict. c. 43, and that the six months' limitation applies. I do not think that this result will cause any inconvenience. If only a few shillings are due, the water company can still recover it before the magistrate; but if they allow a longer period to elapse, and a larger sum to become due, they must sue for it in the county court. I do not see anything unreasonable in that.

I am, therefore, of opinion that the magistrate was right, and that this appeal must be dismissed.

KENNEDY, J. I agree.

Appeal dismissed. Leave to appeal given.

Solicitors for appellants: *George Kebbell & Miller.*
Solicitors for respondent: *Saw & Son.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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1894
July 5.

GRAND JUNCTION WATERWORKS COMPANY *v.* BRENTFORD LOCAL BOARD.

Waterworks—Fixing and Maintaining Fire Plugs—Liability of Local Board—Waterworks Clauses Act, 1847 (10 & 11 *Vict. c.* 17), *ss.* 38–41—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 66.

The Waterworks Clauses Act, 1847, and the Public Health Act, 1875, impose no obligation on an urban local authority to bear the expense of maintaining in repair the fire-plugs in their district, unless such fire-plugs have been fixed by them, or by some water company or person at their request.

APPEAL from a judgment of Lawrance, J.

The action was brought to recover the cost of maintaining in repair certain fire-plugs within the district of Brentford, of which the defendants were the local authority.

The plaintiffs were a company regulated by the Grand Junction Waterworks Act, 1852 (which incorporated the Waterworks

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Clauses Act, 1847), and other special Acts. In pursuance of their statutory powers the plaintiffs had fixed certain fire-plugs in the water-pipes belonging to them in the position required by s. 38 of the Waterworks Clauses Act, 1847, and had from time to time renewed them and kept them in effective repair. They alleged that they had fixed these fire-plugs at the request of the defendants, who had succeeded to the powers and obligations of the town commissioners. They claimed repayment of the expenses of maintaining and repairing them for six years before the commencement of the action. The defendants denied their liability to repair the fire-plugs. The question in dispute turned principally on the construction of ss. 38 to 41 of the Waterworks Clauses Act, 1847 (1), and s. 66 of the Public Health Act, 1875. (2)

(1) 10 & 11 Vict. c. 17, s. 38: "The undertakers, at the request of the town commissioners, shall fix proper fire-plugs in the main and other pipes belonging to them, at such convenient distances, not being more than the prescribed distance, or, if no distance be prescribed, not more than one hundred yards from each other, and at such places as may be most proper and convenient for the supply of water for extinguishing any fire which may break out within the limits of the special Act; within the limits of the special Act, and in case of any difference of opinion as to the proper position or number of such fire-plugs, it shall be settled by such inspector as aforesaid when appointed, and in the meantime by two justices in England and Ireland, and by the sheriff in Scotland."

Sect. 39: "The undertakers shall from time to time renew and keep in effective order every such fire-plug; and as soon as any such fire-plug is completed they shall deposit a key thereof, within the limits of the special Act, where any public fire-engine is kept, and in such other places as may be appointed by the town commissioners, and shall put up a public notice in some conspicuous place in each street in which such fire-plug is situated, shewing its situation, which notice the undertakers may put up on any house or building in such street."

Sect. 40: "The cost of such fire-plugs, and the expense of fixing, placing, and maintaining the same in repair, and of providing such keys as aforesaid, shall be defrayed by the town commissioners."

Sect. 41: "The undertakers shall at the request and expense of the owner or occupier of any work or manufactory situated in any street in which there shall be a pipe of the undertakers, place and maintain in effective order a fire-plug (to be used only for extinguishing fires) as near as conveniently may be to such work or manufactory."

(2) 38 & 39 Vict. c. 55, s. 66: "Every urban authority shall cause fire-plugs and all necessary works, machinery, and assistance for securing an efficient supply of water in case of fire to be provided and maintained, and for this purpose they may enter

It was admitted that many of the plugs had been fixed before the defendants were constituted the governing body of the district by the Public Health Act, 1875; and that they had never made any express request to the plaintiffs to fix the fire-plugs that had been subsequently placed. Lawrance, J., who tried the action without a jury, gave judgment for the plaintiffs to the full amount of their claim. The defendants appealed.

Murphy, Q.C., and *J. Earle*, for the defendants. There is no statutory duty imposed upon the defendants by the Waterworks Clauses Act, or the Public Health Act, or any other statute, to fix fire-plugs where there is a water company competent to provide them; nor is there any statutory obligation on them to pay the expenses of maintaining them unless they have been fixed by themselves or by a water company at their request. Sect. 40 of the Waterworks Clauses Act, 1847, expressly limits the liability to pay the costs of fixing and maintaining the fire-plugs to "such fire-plugs"; that is, fire-plugs which have been fixed at the request of the town commissioners. There has been no such request by the defendants either express or implied in the present case. Nor have they entered into any agreement with the water company under s. 66 of the Public Health Act, 1875. Therefore the plaintiffs' case entirely fails.

Jelf, Q.C., and *W. Baugh Allen*, for the plaintiffs. By s. 42 of the Waterworks Clauses Act, 1847, the plaintiffs are bound to allow the public to take and use water from their pipes for extinguishing fires; but they are not bound to fix fire-plugs unless requested by the local authority. On the other hand, the defendants are bound by s. 66 of the Public Health Act, 1875, to provide and maintain fire-plugs. If, therefore, the defendants use fire-plugs which the plaintiffs have fixed, a request by the defendants ought to be presumed, and they are bound to maintain them. If the plaintiffs were to remove the fire-plugs—which there is nothing in the Acts to prevent—the defendants would

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into any agreement with any water company or person; and they shall paint or mark on the buildings and walls within the streets words or marks near to such fire-plugs to denote the situation thereof, and do such other things for the purposes aforesaid as they may deem expedient."

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be bound to provide new ones, or else to request the plaintiffs to do so. It is therefore merely trifling with the Acts to say that the liability does not properly fall on the defendants.

LINDLEY, L.J. The question in this appeal depends on the true construction of the Acts of Parliament, and upon such inferences as are proper to be drawn from what has taken place. The action is one by the Grand Junction Waterworks Company against the Brentford Local Board, and the object is to compel the Brentford Local Board to pay for the expense of maintaining certain fire-plugs which have been put down and kept in order by the Grand Junction Waterworks Company under the statutory obligations which are imposed upon them. The Grand Junction Waterworks Company say that the Brentford Local Board are bound to pay for this expense. We must look at the source of that obligation, and it is put in two ways. First of all, it is said there is a statutory obligation. Of course, if there is the action is maintainable. Then it is said, if there is not a statutory obligation, at all events there is a contractual obligation—an obligation arising from an agreement to pay which is to be inferred from the conduct of the parties; for it is admitted that there is no clear agreement in writing to pay for these plugs, still less an agreement under seal.

Let us look first at the alleged statutory obligation. The statutory obligation was put by the learned judge upon s. 66 of the Public Health Act, 1875, although the counsel for the respondents did not rest his case upon that section. It is necessary, however, to refer to it, because it seemed to the learned judge to be conclusive upon the subject. The section is this: "Every urban authority" (that includes the defendants) "shall cause fire-plugs and all necessary works, machinery, and assistance for securing an efficient supply of water in case of fire to be provided and maintained, and for this purpose they may enter into any agreement with any water company or person." That, I apprehend, does impose upon the defendants a statutory obligation which can be enforced either by indictment or by information by the Attorney-General; but I do not see that this section imposes any obligation as to the payment of these expenses. It

is not an obligation in favour of the waterworks company. It is not as if the statute imposed upon them the duty of paying the Grand Junction Waterworks Company. It is a section introduced for another purpose and with a different object altogether, and therefore, with great deference to the learned judge, I think he has rather misconceived the scope and purport of that section. That statutory obligation is to be found, if at all, in ss. 38 to 42 of the Waterworks Clauses Act, 1847. The 38th section says this: "The undertakers" (that is the waterworks company) "at the request of the town commissioners"—and the defendants may be taken now to be in the place of the town commissioners—"shall fix proper fire-plugs in the main and other pipes belonging to them" for extinguishing any fire. Then by s. 39: "The undertakers shall from time to time renew and keep in effective order every such fire-plug, and deposit a key thereof where any public fire-engine is kept, and in such other places as may be appointed by the town commissioners, and shall put up a public notice," and so on.

Now, pausing there for a moment, the obligation to fix and the obligation to renew and to keep in order is clearly imposed upon the waterworks company. Then, as regards the cost, s. 40 says: "The cost of such fire-plugs and the expense of fixing, placing, and maintaining the same in repair, and of providing such keys as aforesaid, shall be defrayed by the town commissioners." That makes it clearly a statutory obligation on the town commissioners to pay the cost of such fire-plugs as are referred to in s. 40. The question is what they are. The expression "such fire-plugs" is a little ambiguous, and it may mean one of two things. It may mean proper fire-plugs in the main and other pipes; or it may mean the fire-plugs fixed at the request of the town commissioners under s. 38. The real meaning is to be gathered from the next section (41): "The undertakers shall, at the request and expense of any owner or occupier of any work or manufactory situate in any street in which there shall be a pipe of the undertakers, place and maintain in effective order a fire-plug." Now this shews that the scheme of the Act is as follows: You, the company, are to fix these fire-plugs, and you, the company, are to keep them in order. Who is to pay? If

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you fix them at the request of the town commissioners, they are to be fixed and maintained at the expense of the town commissioners; if you fix them at the request of other people, they are to be fixed and maintained at the expense of those other people. That is the true meaning of these sections; so that I read "the cost of such fire-plugs" in s. 40 as the cost of fire-plugs fixed at the request of the town commissioners." If this case cannot be brought within the class of fire-plugs fixed by the town commissioners there is no statutory obligation on them to pay.

Now, let us look at the facts. There is nothing to shew that any of these plugs have been fixed at the request of the town commissioners; the evidence is all the other way. It is not proved that the plugs which have been put in since 1875, and about which the dispute has arisen, were put in at the request of the defendants. There is no request of the kind. Then we must look and see if we can infer any contract to pay for these plugs apart from the statute. That is possible, because under s. 66, which I have read, there is power to make contracts of this sort.

Now, what sort of agreement must you have? Let us take these fire-plugs en bloc, so as to include them in one contract. I take it to be quite plain that, under s. 174 of the Public Health Act, you must have an agreement under seal. There is no such agreement here. Therefore, in order to establish an agreement, you must prove as many agreements as there are fire-plugs. But then, can you infer, as a fact, that there has been any agreement on the part of the defendants to pay the expense of keeping in repair each of these fire-plugs? The answer is, "No." I do not say that such an inference might not be drawn, but to do so on this evidence would be drawing an inference which the facts do not warrant. That exhausts the case. With what is fair or unfair we have nothing to do. These are statutory obligations—they are not ordinary dealings between man and man; and as the statutory theory is not made out, and the agreement theory cannot be supported, the appeal must be allowed, and judgment must be given for the defendants.

LOPES, L.J. I agree. Sect. 40 says: "The cost of such fire-plugs, and the expense of fixing, placing, and maintaining the

same in repair, and of providing such keys as aforesaid, shall be provided by the town commissioners." Therefore, it becomes important to see what the meaning of "such fire-plugs" is. I think that is made clear by ss. 38, 39, and 40, and the conclusion I come to is this, that "such fire-plugs" means fire-plugs which are fixed at the request of the town commissioners. If that is so, the important matter to consider in this case is whether these fire-plugs can be said to have been fixed at the request of the town commissioners, of whom the defendants are the successors. Is there any evidence of that? To my mind there is no evidence of any request at all. It seems to me impossible to contend for one moment that there is any evidence of any request. The defendants were not in existence at that time. I can see no evidence, therefore, of any statutory obligation. But then it may be said, if there is not a statutory obligation there may be an obligation by contract, and s. 66 is relied upon with regard to that. I again say that I can see no evidence whatever of any agreement at all. If the kind of agreement set up is an agreement to pay for these in a mass, then the difficulty would arise with regard to there being no agreement under seal. If, on the other hand, it is an agreement set up in respect of each particular fire-plug, the thing is very improbable in itself; and, further than that, there is no evidence of any such agreement. I think, therefore, that the present appeal must be allowed.

DAVEY, L.J. I am of the same opinion, and I really have nothing to add, and need not repeat the reasons which have been already given by other members of the Court. I only desire just to say this, that Mr. Jelf's ingenious theory of a request by the local board after they had come into existence to have pipes fixed, and the answer, "Why, the pipes are there already," and then the reply of the defendants, "Oh, very well, let us treat them as if they had been put pursuant to our request," seems to me to fail on several grounds. In the first place, there is no evidence of any such request; and in the next place, even if there were, I do not think the plugs can be held, contrary to the fact, to have been constructively fixed in pursuance of such request. I do not think that would be a satisfaction of the

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statute, and it would come round to what Lindley, L.J., has described as a contract under the powers of the 66th section to render themselves liable for the maintenance of the pipes in the same way as if they had been fixed at their request; and of that, I confess, I can see no evidence.

Appeal allowed.

Solicitors for plaintiffs: *Bircham & Co.*

Solicitors for defendants: *Woodbridge & Sons.*

M. W.

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June 22, 24.

GORDON AND OTHERS *v.* THE VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

Metropolis—Management Acts—Streets—Widening Streets—Compulsory Purchase—Power of Vestry to take part of House—Michael Angelo Taylor's Act (57 *Geo.* 3, *c. xxix., ss.* 80, 82).

Where the authority having control of the streets in a metropolitan district bonâ fide adjudge that part of a house or building obstructs or prevents the widening of a street, ss. 80 and 82 of 57 Geo. 3, c. 29, give such authority power, under some circumstances, to purchase and take compulsorily such part from the owner, and he cannot require them to take the whole house or building, though he be able and willing to sell and convey the whole to them.

Per curiam: Sects. 80 and 82 give the authority power to purchase and take compulsorily part only of a house or building, where the facts establish that such taking will not involve a substantial alteration of the character and condition thereof, so that it can no longer be occupied as the kind of building it was before, or that such taking will not sensibly and substantially interfere with the convenience of the occupier, or render it necessary to make structural alterations in order to carry on a different kind of business, or one of a more limited nature than that carried on before.

MOTION for an interim injunction.

The action was brought for an injunction to restrain the defendant vestry from further proceeding upon certain notices given under 57 Geo. 3, c. xxix., under which notices the vestry sought to have assessed by a jury the compensation to be paid to the plaintiffs for the compulsory purchase and taking of a part of their premises for the purpose of widening a street.

The following material facts appeared from the pleadings in the action, and from admissions made by the parties for the purposes of the motion:—

The plaintiffs were the owners in fee simple of premises,

known as the "Town Hall Tavern," in High Street, Kensington. The tavern was in the occupation of an underlessee who carried on the business in it. In 1887 and 1891 alterations were made in the frontage of the premises, the result being that the building line was thrown back five or six feet, and a projecting stone portico or porch left, having its pavement raised a step above the footway of the street. The cellarage of the premises was altered, and approaches were made to it from the street by flaps on the pavement of the portico.

In November, 1891, the defendant vestry served a notice upon the plaintiffs that, in pursuance of the powers and provisions of 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act) (1), the vestry

(1) By 57 Geo. 3, c. xxix., s. 80, "it shall and may be lawful to and for the commissioners or trustees, or other persons having the control of the pavements of any parochial or other district, from time to time and at all times hereafter to . . . widen any of the streets . . . within any parochial or other district; . . . and if any houses, walls, buildings, lands, tenements and hereditaments, or any part thereof, shall be adjudged by the said commissioners or trustees or other persons as aforesaid to project into, obstruct or prevent them from so . . . widening the said streets . . . and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements or hereditaments will be necessary for that purpose, it shall and may be lawful to and for the said commissioners, &c., and they shall have full power and authority, to treat, contract and agree . . . with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands and hereditaments . . . for the purposes aforesaid, and to pay for the same such sum and sums of money as shall be agreed upon by the said commissioners, &c., and the owner or owners, occupier or occupiers thereof . . . and to pull down, use, sell, or dispose of such houses, walls, and buildings, and the materials thereof, and lay the sites thereof, and also all such other lands, tenements, or hereditaments, or so much thereof as they the said commissioners or, &c., shall think proper, into the said streets."

By s. 82: "If any . . . person or persons seized or possessed of or interested in any such houses, buildings, lands, tenements, or hereditaments as aforesaid shall refuse to treat or agree . . . with the said commissioners, &c. . . . for the sale and conveyance of their respective estates and interests therein," the commissioners, &c., are authorized and required to issue a warrant or warrants, directed to the sheriff or other proper officer of the city, borough, or county wherein the premises respectively are, to empannel a jury in the prescribed manner, who "shall inquire of the value of such houses, buildings, lands, tenements or hereditaments, and of the proportionable value of the respective estates and interests of all and every person and persons seized or possessed thereof, or interested therein, or of or in any part or parts thereof, and shall assess

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intended to widen Kensington High Street; that the possession, occupation, and purchase of the hereditaments and premises specified in a schedule to the notice was necessary for such purpose; that the vestry required to purchase and take those hereditaments and premises, and demanded from the plaintiffs the particulars of their several estates and interest therein, and of their claims in respect thereof; that the vestry were willing to treat, contract, and agree with the plaintiffs for the purchase, and would, if such particulars were not given, proceed to procure the amount of compensation to be settled in the manner prescribed by the Act.

The description of the premises in the schedule was "stone porch, step, and cellar flap."

The plaintiffs, under protest, stated their interest to the vestry, and the amount they claimed for compensation in respect of that part of their premises which the vestry proposed to take; but they objected that the statute did not enable the vestry to take part only of the premises, and required them to purchase and take the whole, which the vestry declined to do. The plaintiffs were willing and able to convey the whole to the vestry.

On July 24, 1893, the vestry served notice on the plaintiffs of their intention to cause a jury to be summoned. Subsequently the plaintiffs commenced the action, and claimed an injunction to restrain the defendant vestry from proceeding, under their notice, or any similar notice, to take part only of the premises, and from issuing their warrant to the sheriff of the county of London, or other proper officer, to summon a jury to assess the value of part only of the premises. The land sought to be taken, and the part of the structure sought to be removed (which together formed part only of the plaintiffs' premises), could not be taken and removed without altering the appearance of the premises, and involving alteration thereto, and the taking of the land would diminish the value of the Town Hall Tavern to the plaintiffs.

The plaintiffs now moved for an interim injunction, and it was

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and award the sum or sums of money to be paid to such person or persons . . . respectively for the purchase of such houses, buildings, lands, tenements, or hereditaments, and of such respective estates and interests therein," &c.

agreed between the parties that the motion should be taken as the trial of the action.

Maurice Powell, (*Willis, Q.C.*, with him), for the plaintiffs. The plaintiffs are entitled to the injunction asked for. The owner of a house, who is able and willing to sell the whole of that house, cannot be compelled to sell part under ss. 80 and 82 of 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act). The point was left undecided in *Teuliere* v. *Vestry of St. Mary Abbotts, Kensington.* (1) Sect. 80 deals with taking land or houses by agreement, and the true construction of it is that, if any part of a house obstructs the widening of the street, the commissioners may treat for the whole, pull down the house, and throw so much as is required into the street; but it is contended that, even by agreement, they cannot take part of a house only. Sect. 82 (which has never received judicial interpretation) deals with a compulsory taking. It gives no power to assess the value of part of a house, nor does it in terms give power to assess damage caused by severance. There is no machinery provided by which the rights of the freeholder and leaseholder can be adjusted when a part only of the house is taken. There is no power—such as that given in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 119—to apportion the rent; and, if part of the house only be taken, the lessee is placed in the position of not being able to perform his covenants. In all the cases decided on Michael Angelo Taylor's Act the commissioners or vestry sought to take the whole, though they only required a part for the purposes of the improvement. There are some passages in the judgments in *Thomas* v. *Daw* (2) and in *Gard* v. *Commissioners of Sewers of the City of London* (3) which may be relied on as being opposed to the view that the commissioners have no power to take, compulsorily, part of a house. The expressions of the learned judges, however, were dicta merely, and are inapplicable to this case, the first in which the commissioners or vestry have sought to take compulsorily a part of

(1) 30 Ch. D. 642. (2) Law Rep. 2 Ch. 1.
(3) 28 Ch. D. 486.

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a house, though the owner was able and willing to sell the whole.

Channell, Q.C., and *G. M. Freeman*, for the defendant vestry. There is only one subject-matter dealt with in ss. 80 and 82 of Michael Angelo Taylor's Act—namely, that which the commissioners adjudicate, bonâ fide, to be necessary for widening the street. Where they adjudicate that so much of a house or of land is necessary the compulsory powers apply. There is no trace of an option having been given to the owner—such as is given by s. 92 of the Lands Clauses Consolidation Act, 1845—to require the purchasing body to take the whole when part only is required. Michael Angelo Taylor's Act has been so construed in *Thomas* v. *Daw* (1) and *Gard* v. *Commissioners of Sewers of the City of London* (2), and the argument put forward for the plaintiffs here is negatived by the judgments in those cases. In *Thomas* v. *Daw* (1) Lord Chelmsford, L.C., said (at p. 7): "I think that in every case of an intended widening or altering a street it is competent to the commissioners to adjudge that the whole of a house or building obstructs or prevents this object. If this is honestly done, although erroneously, I think it cannot be questioned. The only consequence of the commissioners taking more than they require for the street would be that, under the 96th section, they would have to sell it subject to a right of pre-emption in the person from whom the house or building was purchased. But, whether they intend to take the whole or only a part, it is essential as a preliminary step that the commissioners should adjudge that the house, or the part required, prevents them from altering or widening the street, and that the possession of such house (and I add, or such part thereof) is necessary for that purpose." The same view is clearly brought out in the judgments of the Court of Appeal in *Gard* v. *Commissioners of Sewers of the City of London.* (2) Bowen, L.J., said (at p. 511): "Mr. Graham Hastings was driven by logic to say, not only that the commissioners have a right to take the whole if they do not want it, but that they must take the whole though they do not want it; for, if they are not

(1) Law Rep. 2 Ch. 1. (2) 28 Ch. D. 486.

obliged to take the whole, there cannot be any necessity for them to adjudicate that the whole is required when they only want a part"; and again (at pp. 512, 513): "Mr. Graham Hastings contends that they are necessarily bound to adjudicate the whole of the land to be necessary even if they only want a part; while the case of *Thomas* v. *Daw* (1), on the other hand, reads into the latter part of the section the words which occur in its earlier part, 'or any part thereof.' I do not like saying that they were dropped out per incuriam. I prefer to say that, in my opinion, the general words in the latter part of the section, though differing from the general words in the earlier part of the section by the omission of those words, 'or any part thereof,' are nevertheless so wide as to embrace in themselves the part as well as the whole." The proposition contended for here on behalf of the defendants really follows from the judgments in those cases. As Bowen, L.J., pointed out in *Gard's Case* (2) (p. 513), there may be a distinction between the cases of land and of a house, because it cannot reasonably be said that it is necessary for the commissioners to take all the land when they only want a part; but, in the case of a house or building, it may be necessary to take all when they only want to use part on the improvement. It is a question of fact in each case whether the necessity for taking the whole is made out. There will be no practical difficulty in assessing the compensation if part of the house be taken here. Sect. 82 provides that the proportionable value shall be assessed of the respective estates and interests of every person seised or possessed of, or interested in the premises, or of or in any part or parts thereof; and, as between landlord and tenant, there is power to apportion the rent where part of the tenement has been severed by operation of law.

[They also referred to *Steele* v. *Midland Ry. Co.* (3)]

Willis, Q.C., in reply. The distinction between land and a house is pointed out by Kindersley, V.C., in *Thomas* v. *Daw* (4) at pp. 2, 3. The true effect of the legislation is that the fact that part of a house obstructs the improvement must be found

(1) Law Rep. 2 Ch. 1.
(2) 28 Ch. D. 486.
(3) Law Rep. 1 Ch. 275.
(4) Law Rep. 2 Ch. at pp. 2, 3.

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in order to give the vestry jurisdiction. When that is found, the vestry may either treat or negotiate with the owner, or they must purchase the whole of the house. The words in s. 80, "and to pull down, use, sell, or dispose of such houses," &c., infer that the commissioners are to take the whole, and it is also to be inferred from the provisions of s. 96, which give the commissioners power to sell any of the houses which have been conveyed to them in pursuance of the Act, or otherwise. If there remains a question of fact to be determined, the plaintiffs are, at any rate, entitled to an interim injunction to restrain the defendants from further proceeding until that question has been determined.

CAVE, J. In this case the plaintiffs move for an injunction to restrain the defendant vestry from proceeding to have assessed the compensation to be awarded to the plaintiffs in respect of the taking by the vestry of a portion of a house, called the Town Hall Tavern, belonging to the plaintiffs. The first ground upon which the plaintiffs ask for the injunction is that, inasmuch as the taking of the portion in question admittedly will involve the removal of part of the house and an alteration of the appearance of the premises, and will diminish the value of the tavern, there is, therefore, no power to take that portion, and the injunction ought to be granted. Now, in my judgment, those facts are not sufficient to warrant us in granting the injunction. The question whether under the statute there is power to take a portion of a house has never been authoritatively settled. There have been several decisions in cases with respect to taking a portion of land; and, questions having arisen in those cases with respect to the compulsory powers given by the Act, opinions have been expressed which, even supposing they are to be treated as dicta merely, are entitled to our respectful consideration. It has been settled that a portion of an estate may be taken; but that, of course, does not decide the question we have here to deal with, because the words used in the section are "houses, buildings, lands, tenements, or hereditaments," and if you take a portion of an estate you do take land. It cannot, in strictness perhaps, be said that you take a portion of land. Land is a

thing which admits of division in point of fact; and, when you take so much of it as is necessary for the purpose of the improvement, you take land, it seems to me, within the meaning of the Act. By the express decision of the Court of Appeal in *Gard* v. *Commissioners of Sewers of the City of London* (1) you are entitled to take a portion of a piece of land. Though the piece be the only one which the man from whom you are seeking to take it has, and though it be in one occupation and ownership, nevertheless it has been held that you may take a part of that piece, and that the language of the Act gives the power and the right to take a part where land only is concerned. When, however, a house has to be dealt with, different considerations arise. You may divide a piece of land and make of it two pieces of land, and each is land for all purposes; but you cannot divide a house and make of it two houses; you get something which is not a house. If you take half of a building occupied as a tavern, you do not take a tavern and leave a tavern; you take part of a whole thing, and leave the other part of that whole thing for the previous owner of the whole. So far as I can see, the Act does not contemplate that that shall be done; it does not contemplate that part of a house may be taken in the sense that the owner shall be left with something which is not a house, which cannot be used for the purpose for which the house was used before, and which is essentially different in its character and condition from what the house was before. If that were the case made out here, I should be clearly of opinion that the Act of Parliament did not enable a portion of the house in that sense to be taken, and that the whole house must be taken by the vestry. On the other hand, suppose a house with a garden of about thirty feet in depth in front, and suppose that the vestry desire to take two feet of the front part of that garden for the purpose of widening the footway. In that case I should be of opinion, on the authority of the decisions which have been cited, that the vestry could do so under the powers conferred upon them by the Act, because they would be taking a portion of land, and not part of a house. But, to approach somewhat nearer the present case, suppose there was in front of the house a projecting erection, put there solely for the purpose

(1) 28 Ch. D. 486.

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of ornament, the taking away of which would, in the language of the admissions in this case, alter the appearance of the premises, involve alteration to the front of the building, and diminish the value of the house by removing what might be regarded as an ornament to it. Then, if the effect of taking away the projection would be to leave the house substantially as it was before, so that for all purposes of convenient occupation it would be precisely the same house, I should be of opinion that it could be done under the powers given by the Act. The case before us seems to fall between the cases I have put. Some alteration, not merely external but internal, will be required: a new approach to the cellar will have to be made; the alteration to the front of the building will be more extensive than would be necessary where an ornamental pillar merely was removed, and the size of the cellar will be somewhat reduced. Does that constitute a taking of a part of the house? In one sense, no doubt, it does, because some portion of the external part of the house is touched, and some portion of the actual cellar is taken; but whether it constitutes such a taking of a portion of a house as is not warranted by the terms of this Act of Parliament is a point which I am unable, upon this application, to decide. I am of opinion, however, that it is not enough to say, as was urged in the argument addressed to us on behalf of the plaintiffs, that any interference with a house, which will have the effect of requiring alterations to be made, and of diminishing the value of the premises to some, however small, extent, is of itself alone sufficient to cast upon the vestry the necessity of taking the whole house or foregoing the improvement which they think is necessary. But, on the other hand, if what the vestry propose to do will have the effect of so altering the character and condition of the house that it can no longer be occupied as the kind of structure it was before, then I am of opinion that the vestry are proposing to do something which the law does not enable them to compel the owner of the house to accede to. If, for instance, the occupation of the house cannot be carried on as it was before—if so much will be taken as to render it necessary to make structural alterations in the rest of the house in order to adapt it to a different kind of business, or

one of a more limited nature, so that it would be difficult to assess the compensation to be awarded, having regard to the effect which would be produced—then I should say that the vestry would have no power to force upon the owner the taking of a portion of his house. But if, notwithstanding the alteration, the business can be carried on as before, and if the diminution of the size of the cellar will not interfere sensibly and substantially with the convenience of the occupiers and with the use of the house as it is used at present, then I should say that the case is one in which the vestry have power to take the portion of the house which they are seeking to take. All this, however, depends very much upon questions of fact, upon which the parties have a right to be heard. Those questions must be tried in the action. We cannot try them here; it would be impossible, upon the materials we have before us, to form an opinion on which we should be content to act. We should require to have the witnesses before us, and judge for ourselves upon their evidence. No doubt there will be considerable difference of opinion on the one side and on the other as to the effect of what the vestry propose to do. It is only when the questions of fact have been determined that we can say whether the taking of this portion of the house is, or is not, within the powers of the vestry. It is, therefore, impossible to grant an injunction, and impossible on this motion to dispose of the action, as the parties hoped we might be able to do. As to the application for an interim injunction until the trial of the action, I feel a difficulty about that. It seems to me that the plaintiffs have not laid any ground for an interim injunction. We do not know to which side the balance of convenience inclines, and no grounds are laid before us which would justify us, at the present moment, in interfering to stay the proceedings of the vestry. They will, of course, proceed at their peril. If it turns out that they are taking a substantial portion of this house, which will have the effect of altering its character and condition, so that the use to which it has been put hitherto can no longer be continued, then, if our view of the law be correct, the proceedings of the vestry in summoning a jury and having the compensation assessed will go for nothing. If, on the other hand, their contention is established—

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namely, that the alterations necessary are of a comparatively trivial nature, and that the business will still be able to be carried on in the same building, with substantially the same result and the same convenience as before—then the vestry will be right, and the proceedings to have the compensation assessed will have been properly taken.

For these reasons, I am of opinion that this motion should be dismissed.

COLLINS, J. I am of the same opinion. Having regard to s. 80 of the Act and the decisions in the cases cited to us, I think it is now too late to argue that the powers of the vestry are limited to taking the whole either of land or houses, where they come to the conclusion that something less than the whole obstructs the proposed improvement, and is necessary for the purpose of carrying it out. An argument has been addressed to us based upon s. 82, which deals with powers of compulsory purchase, and it was suggested that there are no words in that section pointing to or dealing with anything less than the whole subject-matter—whether land or houses—required for the purposes of the improvement. I think, however, reading all the three sections which form the code on this matter, that s. 80 is the section which lies at the root of the whole question. That was really the view, it seems to me, taken in the cases to which we have been referred; and, following out the scheme of the Act, I think it is the true view. Sect. 80 provides that, "if any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof," shall be adjudged by the commissioners to obstruct the proposed improvement, and that "the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments," will be necessary for the purpose of carrying out the improvement, then it shall and may be lawful for the commissioners, and they shall have full power and authority, to treat with the owners and occupiers for the purposes aforesaid. Now, the construction which has been put upon s. 80 in several cases is this: In the first part of the section there are the words "houses, walls, buildings, or any part thereof," and the section contemplates that the adjudication made by the commissioners,

both as to the fact of obstruction and as to the necessity of purchase, may be limited to a part. That is arrived at by construing the subsequent words, "such houses, walls, buildings, lands, &c.," as embracing the "houses, walls, buildings, lands, &c., or any part thereof," previously mentioned. Following that out, s. 81 deals simply with the case of persons incapacitated to treat, but the subject-matter is the same as in s. 80. Sect. 82, which gives the compulsory powers, deals with the case of persons unable by absence or unwilling to treat; but the subject-matter is again simply referred to as "such houses, buildings, lands, &c.," thus carrying on through the three sections the initial definition of that which the commissioners may consider and deal with, namely, "houses, buildings, lands, &c., or any part thereof." I think, therefore, that it cannot be successfully argued to-day that the construction which has been put upon s. 80 does not apply to s. 82, because s. 80 has hitherto been considered apart from s. 82. Sect. 80 seems to me to be the foundation of the whole code. The Courts have decided that the words "or any part thereof" are by implication carried on into the words "such houses, buildings, lands" in the other part of the section, and I am of opinion that they are so carried on in s. 82. That being the true construction of the Act, it follows, in my view, that there is power to confirm an adjudication, made by the commissioners bonâ fide, that part of a house, as well as part of land, obstructs the improvement, and is necessary for the purposes of the improvement, and it also follows that, where the commissioners have decided that something less than the whole obstructs and is necessary for the purposes of the improvement, they are in a position to put their compulsory powers into operation. I think that the Courts in reality arrived at that conclusion both in *Thomas* v. *Daw* (1) and in *Gard of Commissioners of Sewers of the City of London* (2), and I regard what was said on this point not merely as dicta, but as stating a proposition which was one of the essential steps by which the Courts arrived at the decision of those cases. That would be sufficient to dispose of this motion on the only ground upon which we were asked to grant an injunction. Mr. Powell's proposition broadly was, that the vestry

(1) Law Rep. 2 Ch. 1. (2) 28 Ch. D. 486.

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Collins, J.

had given notice to take compulsorily something less than the whole of a house, and that, the parties interested being able and willing to convey the whole, he was entitled to an injunction because there was no power under the statute to give any such notice. I am of opinion, for the reasons I have given, that that proposition cannot be maintained. It is not enough to oust the jurisdiction of the vestry to say simply that the structure sought to be removed cannot be taken and removed without altering the appearance of the premises and involving alterations thereto, and that the taking of the land will diminish the value of the Town Hall Tavern to the plaintiffs. Those facts are not, in my opinion, sufficient to destroy the right of the vestry to give the notice. There must however, I think, be the distinction in point of fact which has already been pointed out between land and a house. Land is by its nature capable of being divided; a house is primâ facie a unit incapable of division; but there are cases in which it would be impossible to say that a portion of a house might not be cut off without destroying the identity of the house itself. If a particular part of a house can be pointed to which the vestry, bonâ fide, find is the only part which obstructs the improvement, and that part is separable from the house, so that it can be removed without destroying the house as a house, then I should say that there is nothing to prevent the vestry from compulsorily taking that part only. If, on the other hand, the thing, in respect of which they form their judgment that it obstructs and is necessary to be removed, is so indissolubly linked with the whole fabric of the house that, in the opinion of the jury, it cannot be removed without practically destroying the identity of the house as a house, then I think the vestry are not entitled to say that "part thereof" only obstructs, or that "part thereof" only is necessary to be removed for the purpose of the improvement. Under those circumstances, I am of opinion that the vestry could not stop short of taking the whole. Our decision leaves the question of fact to be decided. It is sufficient to say for the purposes of to-day that the plaintiffs' motion for an injunction must be defeated, because they have failed upon the only ground on which they asked for it, and that, as to the application for an interim injunction, we have had no evidence before us to shew that the

balance of convenience is in favour of holding the hands of the vestry until the question of fact is decided.

I am of opinion that this motion should be dismissed.

Motion dismissed.

Solicitors for plaintiffs: *Peacock & Goddard.*

Solicitors for defendants: *Pontifex, Hewitt, & Pitt.*

W. A.

LONDON COUNTY COUNCIL *v.* HUMPHREYS, LIMITED.

1894 *July* 16.

Metropolis—Management Acts—Metropolis Management and Building Acts Amendment Act, 1882 (45 *&* 46 *Vict.* c. 14) *s.* 13—" *Wooden Structure or Erection of a moveable or temporary character* "—*Bungalow erected for Sale and Removal.*

A bungalow constructed of wood and corrugated iron was erected on a piece of land for the purpose of exhibition and sale; but it was not used or occupied, or intended to be used or occupied, on the spot on which it was erected:—

Held, that it was not a "wooden structure or erection of a moveable or temporary character" within the meaning of s. 13 of the Metropolis Management and Building Acts Amendment Act, 1882, and did not require a licence in writing from the London County Council for its erection.

CASE stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

The respondents, Messrs. Humphreys, Limited, were summoned in February, 1894, by the appellants, the London County Council, for having erected a wooden structure of a moveable and temporary character, called a bungalow, without a licence in writing from the county council under 45 & 46 Vict. c. 14, s. 13, and 51 & 52 Vict. c. 41.

The respondents were manufacturers of and dealers in buildings constructed of wood and corrugated iron, and had on their premises at Knightsbridge a piece of land about eighty feet long and forty feet wide on which, during the last two years, several such buildings had been erected, shewn to customers, and sold.

In March, 1893, the bungalow in question was erected on this piece of land and remained there until February, 1894, when it

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was sold to a customer and taken away for the purpose of being re-erected by him in the country.

The bungalow was thirty-one feet long, twenty-eight feet wide, and seventeen feet in height. Its floor was of wood; its sides and ends consisted of wooden uprights and cross-pieces, lined on the inside with match-boarding, and covered on the outside partly with corrugated iron and partly with wood. The roof was formed of wooden rafters, and principals, covered externally with corrugated iron. The interior was divided into four rooms by means of wooden partitions. The bungalow merely rested on the ground, and had no foundations, and it had no chimney or flue.

The bungalow was erected and set up by the respondents for sale, and to attract purchasers, and as an advertisement, but more particularly as a specimen building to be seen by intending customers. From the time of its erection it had upon it a board notifying that it was for sale. The respondents did not at any time apply to the appellants for a licence to erect the bungalow.

The magistrate held that the bungalow was a structure or erection of a moveable or temporary character, but that it was placed where it was, merely for the purpose of sale and as a specimen of the wares sold by the respondents, and therefore dismissed the summons. (1)

Daldy, for the appellants. The bungalow clearly is within the words of the section, and it does not fall within the exception of any of the decisions since it was intended for human habitation: *Hall* v. *Smallpiece* (2); *London County Council* v. *Candler* (3); *London County Council* v. *Pearce* (4); *Stevens* v. *Gourley*. (5)

The consequences may be most disastrous if persons are able to erect these large inflammable bungalows on any vacant

(1) By the Metropolis Management, &c. (Amendment), Act, 1882 (45 & 46 Vict. c. 14), s. 13, "It shall not be lawful for any person to erect or set up in any place any wooden structure or erection of a moveable or temporary character . . . . without a licence in writing first had and obtained from the Board [now the London County Council] for the erection or setting up of such structure or erection in such place. . . ."

(2) 59 L. J. (M.C.) 97.

(3) 60 L. J. (M.C.) 114.

(4) [1892] 2 Q. B. 109.

(5) 7 C. B. (N.S.) 99.

ground in the metropolis, without being subject to the supervision of the county council.

Poland, Q.C., and *Travers Humphreys*, (*Besley*, with them), for the respondents. The section was only intended to apply to cases where the structure or erection was put up to be used where it stood. This bungalow was a mere chattel exposed for sale, and was never occupied or used, or intended to be occupied or used, on the spot on which it was erected.

WILLS, J. This is a case of some difficulty. It is clear that this bungalow is within the very words of s. 13 of the Metropolis Management Act, 1882, as a "wooden structure or erection of a moveable or temporary character"; but it is equally clear from the previous decisions that those words must be limited in some way. My brother Mathew, in *Hall* v. *Smallpiece* (1), and my brothers Pollock and Vaughan Williams, in *London County Council* v. *Pearce* (2), clearly were of that opinion, for in both those cases the structure in question was strictly within the terms of the section. We have to look, I think, at the intention with which the structure in question was erected. It was never intended for use or occupation where it stood. It was erected for sale and removal, and as a sample of the stock-in-trade of the respondents. No doubt it is not an easy matter to draw the line in these cases and to lay down any governing principle. In *Hall* v. *Smallpiece* (1), Mathew, J., said: "The things in question in this case are, in common with the things mentioned in the course of the argument, in a sense, structures; but they are clearly not things with which the Act was intended to deal."

If this bungalow falls within the Act, it follows that every summer-house, and every erection of that character set up for exhibition and sale by the makers of such things, falls within the section and requires a separate licence. Under such conditions a trade of this kind could not be carried on within the area of the London County Council, and a licence would be equally necessary if the structure were put up within an enclosed courtyard or a show-room. I do not think that the section was intended to apply to structures or erections merely

(1) 59 L. J. (M.C.) 97. (2) [1892] 2 Q. B. 109.

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set up for the purpose of immediate sale and removal. We must, I think, apply the test provided by the decision in *London County Council* v. *Pearce* (1), and look at the object with which the building was erected. I do not think that this was the class of case which was struck at by the Act, and I therefore am of opinion that the magistrate was right.

KENNEDY, J. I am of the same opinion. The case is one of considerable difficulty, and it is not easy to say exactly where the line ought to be drawn. The words of the section are, no doubt, wide enough to include this bungalow; but, on the other hand, if full effect be given to those words, the result would be to make the enactment almost foolish. From the cases that have been cited we find that a limited meaning has been given to the words of the section, and I do not think that we are bound to hold that this bungalow is within it. It is, no doubt, difficult to say precisely what structures or erections would or would not be within the section; but in this case the salient point seems to me to be that this bungalow was not intended to be used on the spot on which it was erected. No doubt it was a structure, but it was not intended to remain where it stood or to be used there, but to be sold as soon as possible. In my opinion, the Act was not intended to apply to such buildings. If it were to apply, it would be impossible for any kind of summer-house or structure intended to be sold as a habitation for man, to be erected and exposed for sale without a licence from the county council. I confess that I shrink from such an interpretation of the section. I agree, therefore, in thinking that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *W. A. Blaæland.*
Solicitor for respondents: *T. Duerdin Dutton.*

(1) [1892] 2 Q. B. 109.

A. P. P. K.

[IN THE COURT OF APPEAL.]

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July 4.

KENNEDY *v.* THOMAS.

Bill of Exchange—Dishonour—"On the last Day of Grace"—Notice of Dishonour—Accruer of Cause of Action—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 14, 47.

By the Bills of Exchange Act, 1882, s. 14, sub-s. 1, a bill of exchange is due and payable "on the last day of grace":—

Held, that when payment of a bill of exchange is refused by the acceptor at any time on the last day of grace, the holder, though he is entitled at once to give notice of dishonour to the drawer and the indorsees, has no cause of action against either the acceptor or the other parties to the bill until the expiration of that day.

An action brought by the holder against the acceptor on the last day of grace must be dismissed as premature.

Wells v. *Giles* (2 Gale, 209) approved and followed.

APPEAL by the defendant against the judgment of Cave, J., at the trial of the action for the plaintiff.

The action was brought by the holder against the acceptor of a bill of exchange for 75*l.*, dated October 16, 1893, and payable three months after date. The bill was accepted on the day of its date, "payable at the London and S. Western Bank, Fleet St. Branch."

By his statement of defence the defendant said, "the defendant has a statutory defence, the plaintiff having commenced his action before the expiration of the three days of grace allowed by s. 14 of the Bills of Exchange Act, 1882." The bill was presented for payment at the London and South Western Bank about 2.30 P.M. on January 19, 1894. Payment was refused, on the ground that the acceptor's account was closed. The holder's address was left with the clerk at the bank. At a later hour on the same day the plaintiff issued the writ in this action. Cave, J., gave judgment for the plaintiff for 27*l.* 10*s.*, the amount which he had paid for the bill. The defendant appealed.

E. B. Calvert, and *Lister Drummond*, for the defendant. Judgment ought to have been entered for the defendant. The action

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was commenced prematurely. No cause of action arose against the defendant until the expiration of the last day of grace. By s. 14, sub-s. 1, of the Bills of Exchange Act, 1882 (1), a bill of exchange "is due and payable on the last day of grace," and that must mean that it is not due before the end of that day. The acceptor is entitled to the whole of the day in which to pay the bill. Though the bill was made payable at the bank, the acceptance was a "general" one, because it was not to pay only at the bank. After the refusal of the bank to pay the defendant might have paid the bill elsewhere. *Wells* v. *Giles* (2) is a direct decision that the action was premature. On the refusal of the bank to pay the bill it was dishonoured so as to entitle the holder to give notice to the drawer and the indorsers, but he had no right of action against the acceptor until the next day: *Hartley* v. *Case.* (3)

[They were stopped by the Court.]

Germaine, for the plaintiff. On the refusal of the bank to pay the bill it was dishonoured and a cause of action accrued to the holder against the acceptor, though he had a locus pœnitentiæ during the remainder of the day, and, if before the end of it he had come forward and paid the bill, the writ would have become

(1) By s. 14: "Where a bill is not payable on demand the day on which it falls due is determined as follows:—

"(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace."

By s. 19: "(1.) An acceptance is either

"(*a*) general, or (*b*) qualified.

"(2.) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

"In particular an acceptance is qualified which is" (inter alia):

"(*c*) local, that is to say, an acceptance to pay only at a particular specified place.

By s. 47 (1.): "A bill is dishonoured by non-payment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) when presentment is excused and the bill is overdue and unpaid.

(2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder."

(2) 2 Gale, 209.

(3) 1 C. & P. 555.

abortive: *Leftley* v. *Mills* (1); *Haynes* v. *Birks* (2); *Burbridge* v. *Manners*. (3) In *Leftley* v. *Mills* (1) Buller, J. (differing from Lord Kenyon, C.J.), expressed an opinion that the acceptor was not entitled to the whole of the last day of grace within which to pay the bill. The two judgments of Abbott, C.J. (at the trial and in banc), in *Hartley* v. *Case* (4) are inconsistent. Every opportunity was given to the acceptor to pay the bill. No presentment to him was necessary, the acceptance being a general one. Under s. 47 of the Bills of Exchange Act, 1882, an immediate right of recourse against the drawer and indorsers accrued to the holder on the non-payment of the bill. That implies that he had an immediate right of action against those persons, for a right of recourse is of no value unless it can be enforced by action. If there is a right of action against the drawer and indorsees there must equally be a right of action against the acceptor. The former can be sued by the holder, only because the acceptor has made default. By s. 51, sub-s. 4, of the Bills of Exchange Act, 1882, "when a bill is noted or protested, it must be noted on the day of its dishonour"; but it would be impossible to do this if the acceptor has the whole of the last day of grace in which to pay the bill. In Byles on Bills (14th ed.), at p. 299, it is said: "The acceptor of a bill . . . . should pay it on a demand made, at any time within business hours, on the day it falls due. And, if it be not paid on such demand, the holder may instantly treat it as dishonoured." *Wells* v. *Giles* (5) is very shortly reported, and the opinion expressed by Buller, J., in *Leftley* v. *Mills* (1) does not appear to have been cited. That opinion is strongly in favour of the plaintiff's argument. The bill is due and payable on the last day of grace at any reasonable time, and if payment is refused a cause of action at once accrues to the holder. He is not bound to wait until the end of the day.

Lister Drummond, in reply. The law does not recognize fractions of a day: *Coleman* v. *Sayer* (6); *Webb* v. *Fairmaner*. (7) The onus is on the plaintiff to shew that a right of action existed

(1) 4 T. R. 170.
(2) 3 B. & P. 599.
(3) 3 Camp. 193.
(4) 1 C. & P. 555.
(5) 2 Gale, 209.
(6) 1 Barnard. 303.
(7) 3 M. & W. 473.

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before he issued his writ: *Castrique* v. *Bernabo.* (1) The courts in America have decided in accordance with *Wells* v. *Giles* (2); *Osborn* v. *Moncure* (3); *Hopping* v. *Quin.* (4)

LINDLEY, L.J. (after stating the facts). There is no doubt that, upon payment of the bill being refused by the bank, the plaintiff had an immediate right of recourse against the drawer and indorsers. But the question which we have to consider is, whether the plaintiff had then a cause of action against the acceptor, whether the acceptor could be sued upon the bill before the expiration of the last of the days of grace; in other words, whether the acceptor was not entitled to the whole period up to the end of that day in which to pay the bill. Primâ facie, I should have thought it plain that according to ordinary principles of law he was so entitled. But we are asked to hold to the contrary, partly upon the construction of the Bills of Exchange Act, 1882, and partly in deference to the opinion expressed by Buller, J., in *Leftley* v. *Mills.* (5)

When we look at the Act we see that it does not go to that extent. It certainly seems a little paradoxical that a bill of exchange should be treated as dishonoured for one purpose and not for another, but it is clear that, when payment of a bill is refused upon its presentation at any time during the day on which it falls due, the holder has an immediate right of recourse against the drawer and the indorsers. He can at once give notice of dishonour to the drawer and the indorsers, but he is not entitled to commence an action against them, any more than against the acceptor, before the expiration of the last day of grace. If we were to hold the contrary we should really be cutting down the days of grace. It is true that in *Leftley* v. *Mills* (6) Buller, J., dissented from the view expressed by Lord Kenyon, C.J. Lord Kenyon thought that, in the case of a bill of exchange as in the case of other contracts, if a man was bound to pay money within a certain time, "the party bound had till the last moment of the day to deliver himself from the obligation

(1) 6 Q. B. 498.
(2) 2 Gale, 209.
(3) 3 Wend. (New York) 170.
(4) 12 Wend. (New York) 517.
(5) 4 T. R. 170, at p. 174.
(6) 4 T. R. 170.

by paying." Buller, J., said that the acceptor's undertaking was "to pay the bill on demand on any part of the third day of grace," and that the bill was "payable any time on the last day of grace on demand, provided that demand be made within reasonable hours."

But the point then before the Court was not the right of the holder to bring an action upon a dishonoured bill, but his right to protest the bill or to give notice of dishonour, and as to that the view expressed by Buller, J., was clearly accurate. The point which we have to decide is not a new one; it was actually decided in *Wells* v. *Giles* (1), though that case is not referred to in Byles on Bills. But it is a clear decision that an action upon a dishonoured bill cannot be commenced upon the third day of grace. The same thing has been decided in America, as is shewn by the cases which have been cited to us, and it is not inconsistent with the provisions of the Bill of Exchange Act, 1882. *Hartley* v. *Case* (2) is rather in favour of this view than against it. The argument addressed to us on behalf of the respondent is not, as it appears to me, supported by any English authority; and there is the direct authority of *Wells* v. *Giles* (1) to the contrary, which is in accordance with the general understanding of merchants. In my opinion, judgment must be entered for the defendant with costs. The defence is a technical one, but it was distinctly raised in the pleadings.

LOPES, L.J. I am of the same opinion. Sect. 14 of the Act says that a bill of exchange is "due and payable on the last day of grace," and I read that as meaning that the bill is due and payable at the end of the last day of grace, and that no cause of action by the holder against the acceptor exists until the end of the third day of grace. Presumably the object is to give the acceptor the opportunity of paying the bill at any time during the three days of grace. If he has not the whole of the third day during which to meet the bill, I cannot see how he gets three days of grace. This was evidently the view of Byles, J., for he says in his work on Bills, 14th ed., at p. 278: "Three days of grace are in every case (unless otherwise provided in

(1) 2 Gale, 209. (2) 1 C. & P. 555.

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the bill or note) added to the time of payment, and the bill or note falls due on the last of these." And again at p. 281: "A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties." And again at p. 299: "The acceptor has the whole of that day" (the day on which the bill falls due) "within which to make payment; and, though he should, in the course of that day, refuse payment, which refusal entitles the holder to give notice of dishonour, yet if he subsequently on the same day makes payment, the payment is good, and the notice of dishonour becomes of no avail." In my opinion the true view is that the acceptor is entitled to the full benefit of the three days of grace, and, notwithstanding the able argument which has been addressed to us, and the cases which have been cited, I am of opinion that an action cannot be brought against the acceptor until after the expiration of the last of those days.

DAVEY, L.J. I am of the same opinion, and I should add nothing but for the fact that we are differing from the judgment of the Court below. Apart from authority, I should have thought that, when three days of grace are allowed for the payment of a bill of exchange the acceptor has the whole of the last day in which to pay the bill, subject to his doing so within reasonable hours, and that he cannot, for the purpose of an action being brought against him upon the bill, be said to have made default in payment until the end of the third day of grace. In other words, no right of action accrues to the holder of the bill against the acceptor until the expiration of the third day of grace. Although there is no other express decision on the point, there is *Wells* v. *Giles* (1), and the opinion of Byles, J., to the same effect is clearly expressed in the passage which has been read by my brother Lopes. We are asked to take a different view by reason of some words in the Act of 1882, and of other cases which have been referred to. But those authorities do not seem to me to be in point. They are all directed to the point whether notice of the dishonour of a bill can be given to the drawer and indorsers on the last day of grace, so as to entitle

(1) 2 Gale, 209.

the holder subsequently to recover from them. It is true that in *Leftley* v. *Mills* (1) Buller, J., expressed an opinion different from that of Lord Kenyon, but the point to which his observations were directed was, whether notice of dishonour given upon the third day of grace was sufficient to charge an indorser of the bill. The same point arose in *Haynes* v. *Birks*. (2) There the question was, whether, a bill having become due on a Saturday, and having been dishonoured, notice of dishonour given to an indorser on the following Tuesday was sufficient to charge him, and in dealing with that question Lord Alvanley, C.J., referred to the opinion expressed by Buller, J., in *Leftley* v. *Mills* (1), and he came to the conclusion that the notice was sufficient to enable the holder to have recourse to the indorser. The case had nothing to do with the accruer of a right of action against the acceptor upon the bill. The same point was dealt with in *Burbridge* v. *Manners*. (3) In *Hartley* v. *Case* (4), it is assumed, I think, in both the judgments of Abbott, C.J. (that at the trial and that in banc), that the acceptor has the whole of the last day of grace in which to pay the bill, although non-payment upon presentation of the bill at any time on the last day is such a dishonour as entitles the holder to give notice of dishonour to the drawer and indorsers. Those, I think, were all the cases referred to for the plaintiff. As regards s. 47 of the Act, I do not construe it as the plaintiff's counsel contends that it should be construed. It does not say that on the presentation and dishonour of the bill an immediate right of action against the drawer and the indorsers accrues to the holder, and I do not think that is the meaning. It would be very anomalous if, in respect of the same bill of exchange, rights of action against different persons were to accrue at different times. In my opinion, s. 47 means only that the holder of the bill may, immediately upon payment being refused by the acceptor, give notice to the drawer and the indorsers, telling them that he shall hold them liable upon it. But they, as well as the acceptor, still have the whole of the last day of grace in which to pay the bill, and, if it is not paid before the end of that day, the holder's right of action against them

(1) 4 T. R. 170.
(2) 3 B. & P. 599.
(3) 3 Camp. 193.
(4) 1 C. & P. 555.

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becomes complete. It is for the benefit of the holder that he should be able to give notice of dishonour on the last day of grace, because by so doing he obtains a right of action against the drawer and the indorsers earlier than he otherwise would. I agree that the appeal should, under the circumstances, be allowed with costs, and that judgment should be entered for the defendant.

Appeal allowed.

Solicitors: *F. C. Sydney; Edward Kennedy.*

W. L. C.

1894
July 28.

[CROWN CASE RESERVED.]

THE QUEEN *v.* SILVERLOCK.

Criminal Law—False Pretences—Form of Indictment—Evidence—Proof of Handwriting by Comparison—Skilled Witness—28 & 29 *Vict. c.* 18, *s.* 8.

A count in an indictment for obtaining a cheque by false pretences charged that the defendant, by causing to be inserted in a newspaper a fraudulent advertisement [setting it out], did falsely pretend to the subjects of Her Majesty the Queen that [setting out the false pretence], by means of which last-mentioned false pretence he obtained from A. a cheque:—

Held, that the count was good, although it did not allege that the false pretence was made to a particular person.

Reg. v. *Sowerby* ([1894] 2 Q. B. 173) distinguished.

By 28 & 29 Vict. c. 18, s. 8: "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute."

Held, that a witness giving evidence under this section need not be a professional expert, or a person whose skill in the comparison of handwritings has been gained in the way of his profession or business.

CASE stated by the chairman of quarter sessions for the county of Worcester, from which the following facts appeared.

The defendant was tried upon an indictment containing two counts for obtaining a cheque by false pretences. The first count was in the ordinary form, and alleged a false pretence to Rosa Alice Coates, and an obtaining of the cheque from her by means of the false pretence. The second count charged that the

defendant, "by inserting and causing to be inserted in a certain newspaper called the *Christian World* a fraudulent advertisement in the words and figures following, that is to say, "Housekeeper wanted for branch business establishment in Midlands; one from country preferred. Address S. C., *Christian World* office," did falsely pretend to the subjects of Her Majesty the Queen that he, the said George Silverlock, then required a housekeeper for a branch business establishment in the Midlands, by means of which said last-mentioned false pretence the said George Silverlock did then unlawfully obtain from the said Rosa Alice Coates a certain valuable security," &c.

Before the defendant pleaded, his counsel applied to have the second count quashed, on the ground that it was not stated therein that the false pretence was made to any definite person, but to all the subjects of Her Majesty the Queen, and that therefore it was bad in law on the authority of *Reg.* v. *Sowerby.* (1) The chairman overruled the objection.

It became necessary to prove that certain documents were in the defendant's handwriting; and to do this the prosecution called as a witness a police superintendent, who produced a letter and envelope that he had seen the defendant write, and a letter that the defendant had told the witness was in his handwriting. It was then proposed to prove a draft advertisement of "S. C.," and certain letters alleged to be in the defendant's handwriting, by comparison of the handwriting of the advertisement and letters with the admitted handwriting of the defendant, and the solicitor for the prosecution was called as an expert for this purpose. It was objected that the solicitor was not an expert, and could not give evidence as to his opinion. The solicitor said that he had since 1884, quite apart from his professional work, given considerable study and attention to handwriting, and especially to old parish registers and wills, and had on several occasions professionally compared evidence in handwriting, but had never before given evidence as to handwriting; also that he had formed an opinion that the defendant was guilty before he began to compare the handwriting. The objection was overruled,

(1) [1894] 2 Q. B. 173.

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THE QUEEN v. SILVERLOCK.

and the evidence was admitted. The jury convicted the defendant. (1)

The questions of law for the opinion of the Court were—(1.) whether an indictment for false pretences by advertisement must allege a specific person to whom the false pretence was made, or whether an indictment for such offence alleging a false pretence to all the Queen's subjects was good in law; (2.) whether it was necessary, in the case of proving handwriting by comparison, for the person who draws attention to the points of resemblance to be a professional expert or a person whose ordinary business leads him to have special experience in questions of handwriting, or whether the evidence of any person who has, or states he has, for some years studied handwriting would be admissible for that purpose.

Marchant, for the defendant. The second count is bad; it does not contain an allegation of the person to whom the false pretence was made, which is a material and necessary averment: *Reg.* v. *Sowerby* (2); an allegation that it was made to all the Queen's subjects is too vague, and is insufficient. Secondly, the evidence of the solicitor was not admissible under 28 & 29 Vict. c. 18, s. 8. (3) The witness was not an expert. In order to give evidence on matter of opinion, a witness must be not only skilled, but he must be skilled by virtue of his business; he must be an expert: *Reg.* v. *Harvey* (4); *Reg.* v. *Wilbain.* (5)

The mere study of a science or art does not make a man capable of giving evidence upon it: *Bristow* v. *Sequeville* (6), where a witness who had studied foreign law in a foreign university, but was not a lawyer by profession, was held

(1) It appeared that a general verdict of guilty was taken, and that the verdict was neither taken nor entered separately on each count.

(2) [1894] 2 Q. B. 173.

(3) By 28 & 29 Vict. c. 18, s. 8 (which, by s. 1, applies to all courts of criminal judicature), "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute."

(4) 11 Cox, 546.

(5) 9 Cox, 448.

(6) 5 Ex. 275.

incapable of giving evidence as to what the law of the foreign country was.

[VAUGHAN WILLIAMS, J. No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people. Is not a solicitor in that position?]

No; the study of handwriting is no part of his business.

[He also cited *Rowley* v. *London and North Western Ry. Co.* (1); Best on Evidence, 8th ed. p. 467; Stephen on Evidence, 4th ed. p. 58; Taylor on Evidence, 8th ed. s. 1870.]

Vachell, for the prosecution, was desired to confine his argument to the first point. The count is good; it sets out the actual facts, instead of alleging a legal fiction. It was unnecessary to allege that the false pretence by advertisement was made to a particular person, for at the time of advertising there was no particular person whom the defendant desired to defraud. There is sufficient in the count to shew that the false pretence was made to the person from whom, as is alleged in the count, the money was obtained. *Reg.* v. *Sowerby* (2) is not in point; for there was in that case no averment of the person from whom the money was obtained, and it was impossible to cure the omission of the averment of the person to whom the false pretence was made. [He referred to *Reg.* v. *Cooper.* (3)]

LORD RUSSELL OF KILLOWEN, C.J. I am of opinion that this conviction should be affirmed. The defendant was tried at quarter sessions upon an indictment containing two counts: the first count stated in an unobjectionable way that the defendant made a false pretence to Rosa Alice Coates, that it was false to his knowledge, and that on the faith of it he obtained from her a cheque for 5*l*. The second count, which alone we have to consider, alleged that he inserted an advertisement in a newspaper, setting out the terms of the advertisement, and that by means of the advertisement he falsely pretended to the subjects of Her Majesty the Queen that he required a housekeeper, by means of which false pretence he obtained the cheque from Rosa Alice

(1) Law Rep. 8 Ex. 221. (2) [1894] 2 Q. B. 173.
(3) 1 Q. B. D. 19.

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Lord Russell, C.J.

Coates. At the trial no objection was, or could have been, taken to the first count; but the second count was objected to as being insufficient, and, as the verdict was taken and entered generally and not separately on each count, the conviction must be quashed if that count is bad.

There is no doubt as to what are the essentials of the offence of obtaining money by false pretences: there must be a false pretence made to a definite person, and it must be proved that such person on the faith of the false pretence parted with his money or goods. Those essentials must be stated in the count charging the offence, and the question here is whether the second count complies with these conditions. I cannot say that I have felt no doubt or hesitation upon the matter, but upon the whole I think that the count does sufficiently state the offence. The advertisement is addressed to all persons to whose knowledge it may come, and who may desire to act upon it; and if a particular person, after seeing or hearing it, acts upon it and goes to the person from whom it proceeds, and upon the faith of it parts with his money or goods, it becomes an advertisement to that particular person, who is one of the class of persons for whom it was intended. Does that sufficiently appear in this count? I think that it does: it states that the defendant procured the insertion of the advertisement, that by so doing he made a false pretence to Her Majesty's subjects, and proceeds with the important averment that by means of that false pretence he obtained a cheque from Rosa Alice Coates. I think, therefore, that this count does satisfy the requirements of the law by stating the essential conditions of the offence, although I feel bound to add that it is loosely, inartistically, and anything but clearly drawn.

The case of *Reg.* v. *Sowerby* (1) was referred to during the argument. We should, of course, regard that decision, if in point, as a binding authority; but when it comes to be examined it proves to be no authority at all for the defendant's contention. In that case two essential averments were wanting. In the first place, there was no allegation that the false pretence was

(1) [1894] 2 Q. B. 173.

made to any person; whereas here it is alleged to have been made to all the Queen's subjects—an allegation which becomes particular as regards the particular person who acts upon it; and, secondly, the indictment in *Reg.* v. *Sowerby* (1) does not contain the material allegation of the person from whom the money was obtained—an averment which appears in the count under consideration. The decision in *Reg.* v. *Sowerby* (1), therefore, only came to this, that in the absence of those two material allegations the count was insufficient, and, therefore, bad.

We now come to the second objection, as to the proof of the handwriting, which affords a good illustration of that class of evidence called evidence of opinion. It is true that the witness who is called upon to give evidence founded on a comparison of handwritings must be peritus; he must be skilled in doing so; but we cannot say that he must have become peritus in the way of his business or in any definite way. The question is, is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence. There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business. It is, however, really unnecessary to consider this point; for it seems from the statement in the present case that the witness was not only peritus, but was peritus in the way of his business. When once it is determined that the evidence is admissible, the rest is merely a question of its value or weight, and this is entirely a question for the jury, who will attach more or less weight to it according as they believe the witness to be peritus. Two cases have been cited, one as containing a decision of Blackburn, J., the other (an Irish case) a decision of Pigot, C.B.; but neither of them is an authority for the proposition contended for; they come only to this—that in each case the witness was a policeman, and that the judge thought that under the circumstances of the case his evidence was not such as ought to be received. I think, therefore, that there has been

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here no mis-reception of evidence, and, as the second count is good, the conviction must stand.

MATHEW, J. I am of the same opinion. The first question is the only one which presents any real difficulty, and the difficulty might have been avoided had the verdict been taken separately on each count—a practice that it is important to bear in mind, seeing that we are still hampered with regard to indictments by the rules of pleading which were in force in civil actions before the Common Law Procedure Act. In an action for deceit, it was necessary to state with particularity all the ingredients which went to make up the defendant's liability, and in an indictment for false pretences the ingredients of the offence must be set forth in the same way. There is an excellent description of the requirements of the law in this respect in the judgment of the present Master of the Rolls in *Reg.* v. *Aspinall* (1), where that learned judge says: "To support a charge of obtaining money, &c., by false pretences, it is necessary to shew, and therefore to allege, that the prisoner, with a wicked or criminal mind, stated something which, if true, would be an existing fact; that he did so with intent to procure the possession of money, &c.; that he knew his statement was —that is to say, that so far as his mind was concerned he intended that his statement should be—false; that by the statement he did so act on the mind of the prosecutor as that he did thereby obtain money, &c.; that the statement was in fact untrue, in the sense of being incorrect." If we take the present count, it is clear that it offends against the old rules which were applicable. But there is this important qualification—that although after verdict we cannot supply an absent averment, an imperfect averment may be treated as cured by verdict. In the present case it is not shewn in the second count how the money was obtained in consequence of the advertisement; but that is clear from the first count, upon which the accused was convicted, and we are therefore entitled to infer that the jury had all the facts before them, and that it was in consequence of the advertisement that she parted with her money. In connection

(1) 2 Q. B. D. 48.

with this, the same learned judge says, in *Reg.* v. *Aspinall* (1): "There is another rule with regard to pleading which must be enunciated, the rule with regard to the effect to be given to pleadings after verdict. It is thus stated in *Heymann* v. *Reg.* (2): 'Where an averment, which is necessary for the support of the pleading, is imperfectly stated, and the verdict on an issue involving that averment is found, if it appears to the Court after verdict that the verdict could not have been found on this issue without proof of this averment, then, after verdict, the defective averment, which might have been bad on demurrer, is cured by the verdict.' Upon this it should be observed that the averment spoken of is 'an averment imperfectly stated,' i.e., an averment which is stated but which is imperfectly stated. The rule is not applicable to the case of the total omission of an essential averment." That is distinctly applicable to the present case, and if any further authority were wanted it would be found in *Hamilton* v. *Reg.* (3)

It is necessary to say a word about *Reg.* v. *Sowerby.* (4) The distinction between that case and the present is that in that case averments were absent which were indispensable to the statement of the offence, and which could not be supplied—averments of the person to whom the false pretence was made, and of the person from whom the money was obtained. Had the defendant been acquitted on that count, and subsequently prosecuted for the same offence upon a good count, there might have been a difficulty in the way of the defence. That decision is no authority in the present case.

Upon the other point, as to the proof of the defendant's handwriting, I am of opinion that the evidence was clearly admissible.

DAY, J. I concur in the judgment pronounced by my lord.

VAUGHAN WILLIAMS, J. I am of the same opinion, and I only desire to say that in my opinion it seems unnecessary to refer to the principle of the correction of an imperfect averment after

(1) 2 Q. B. D. 48.
(2) Law Rep. 8 Q. B. 102.
(3) 9 Q. B. 271.
(4) [1894] 2 Q. B. 173.

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verdict, because the second count of the indictment, though inartistic, is in my judgment sufficient.

KENNEDY, J. I concur in the judgment of my lord.

Conviction affirmed.

Solicitors for the prosecution: *Bernard King & Sons, Stourbridge.*

Solicitor for defendant: *Garratt, Dudley.*

W. J. B.

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July 12; *Aug.* 8.

TRUMAN, HANBURY, BUXTON & CO., LIMITED *v.* KERSLAKE.

Local Government—Nuisance—Abatement—"Owner"—Premises not let at a Rack-rent—Sub-lease—Public Health (London) Act, 1891 (54 *&* 55 *Vict. c.* 76), *s.* 141.

Where the lessee of premises not let at a rack-rent has sub-let them for the whole term, less a few days, the rent reserved and the covenants and conditions being the same as in the original lease, the sub-lessee and not the lessee is the "owner" of the premises within the meaning of s. 141 of the Public Health (London) Act, 1891, which enacts that "owner" shall mean "the person for the time being receiving the rack-rent of the premises . . . or who would so receive the same if such premises were let at a rack-rent."

CASE stated by the Court of Quarter Sessions for the administrative county of London.

The appellants, Truman, Hanbury, Buxton & Co., Limited, were, in December, 1893, summoned before a metropolitan magistrate to answer a complaint made by the respondent, the sanitary inspector for St. Giles, Camberwell, that a certain nuisance existed at No. 73, Wyndham Road, Camberwell, after notice had been served upon them to abate such nuisance, under the Public Health (London) Act, 1891, and that they as owners had made default in complying with such notice. The magistrate convicted the appellants, who appealed to the Court of Quarter Sessions. That Court affirmed the conviction, but stated a case for the opinion of the Court.

It appeared that on September 21, 1874, one George Hastings had leased No. 73, Wyndham Road, together with the adjoining house, No. 71, to one Gurney Hanbury, for a term of thirty-nine and a half years (less ten days), to commence on June 24, 1885,

at an annual rent of 50*l.*, payable quarterly, the lessee covenanting to pay all land-tax, sewers rates, tithes, or rent-charges, or payments in lieu thereof, and all other rates, taxes, assessments, and impositions whatsoever, parliamentary or parochial, during the term of the lease, and also covenanting at all times during the term to insure, and well and sufficiently repair, and keep in good order and condition, the premises and all walls, privies, sinks, drains, cesspools, sewers, &c.

On March 29, 1881, Gurney Hanbury sub-let the premises Nos. 71 and 73, Wyndham Road, to one Thomas Aslett, for the term of thirty-nine and a half years, from June 24, 1885, less twenty-one days. The sub-lease contained the same covenants and conditions as the original lease, and the rent reserved was also 50*l.*; but Aslett paid Hanbury a premium of 525*l.*

In 1883 Hanbury assigned his lease to the appellants, and in the same year Aslett assigned his sub-lease to one Bishop, who paid him a premium of 790*l.* Bishop occupied No. 73, Wyndham Road himself, and let No. 71 to a man named Eggleton as a weekly tenant at a rental of 11s. a week.

The question of law raised by the case was whether the appellants were, within the meaning of the Public Health (London) Act, 1891, the "owners" of No. 73, Wyndham Road. (1)

(1) By the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 4: "On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act, the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the . . . . owner of the premises on which such nuisance arises, requiring him to abate the same. . . ."

Sect. 5 gives power to the justices to make an order on non-compliance.

By s. 141: "The expression 'owner' means the person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent.

"The expression 'rack-rent' means rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises, and the full annual value shall be taken to be the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the premises, if the tenant undertook to pay all usual tenants' rates and taxes, and tithe commutation rent-charge (if any), and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses (if any) necessary to maintain the premises in a state to command such rent."

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TRUMAN, HANBURY, BUXTON & Co. v. KERSLAKE.

Bigham, Q.C., and *Bodkin*, for the appellants. The appellants are not the owners of No. 73. They are not the persons who would receive the rack-rent if it were let at a rack-rent. The mere fact that a rent is paid to them, which is not a rack-rent, does not make them "owners" within the meaning of the Act. [They cited *Bowditch* v. *Wakefield Local Board* (1); *Wright* v. *Ingle.* (2)]

Biron, for the respondent. The object of the definition clause was to make the owner and not the tenant responsible. There is no person other than the appellants who would be entitled to receive the rack-rent if the premises were let at a rack-rent. [He cited *Parker* v. *Inge.* (3)]

Cur. adv. vult.

Aug. 8. The judgment of the Court (Lawrance and Kennedy, JJ.) was read by

KENNEDY, J. The only question in this case is whether or not the Court of Quarter Sessions for the administrative county of London was right in holding the appellants Truman, Hanbury, Buxton & Co., Limited, to be "owners," within the meaning of the Public Health (London) Act, 1891, of certain premises, No. 73, Wyndham Road, Camberwell. The Court, holding them to be such owners, upheld on appeal their conviction by one of the metropolitan police magistrates under the said statute for having certain structural nuisances upon the above-mentioned premises after notice to abate the same.

The premises in question were, with certain adjoining premises (No. 71, Wyndham Road), on September 21, 1874, leased by George Hastings to one Gurney Hanbury for the term of thirty-nine and a half years, less ten days, from June 24, 1885, at a yearly rent of 50*l.*, payable quarterly. By the terms of this lease, the lessee covenanted to pay all land-tax, sewers rates, tithes, or rent-charges, or payments in lieu thereof, and all other rates, taxes, and assessments and impositions whatsoever, parliamentary or parochial, during the term of the lease. The lessee also covenanted during the term at all times to insure and well and sufficiently repair the premises and all walls, privies, sinks,

(1) Law Rep. 6 Q. B. 567. (2) 16 Q. B. D. 379.
(3) 17 Q. B. D. 584.

drains, cesspools, sewers, &c., and keep the same in good order and condition.

On March 29, 1881, the lessee, Gurney Hanbury, sub-let the same premises to Thomas Aslett for the term of thirty-nine and a half years from June 24, 1885, less twenty-one days. The sub-lease contained the same covenants and conditions as the lease to Gurney Hanbury, and the rent was the same; but Aslett paid Gurney Hanbury a premium of 525*l.*

In the year 1883 Gurney Hanbury assigned his lease to the appellants, and Aslett assigned his sub-lease to Bishop, Bishop paying Aslett therefor a premium of 790*l.*

Bishop, after obtaining his assignment of the sub-lease, occupied the premises No. 73, which were licensed premises, himself, and let No. 71 to one Eggleton as a weekly tenant at a rental of 11*s.* a week.

Therefore, as regards No. 73, at the time of the complaint against the appellants as the owners of No. 73 the interest of the various parties in the premises stood thus:—

Bishop, the occupier of the premises, as assignee of the sub-lease to Aslett, paid 50*l.* a year rent to the appellants, who were assignees of the lease to Gurney Hanbury; and the appellants, as such last-mentioned assignees, paid a yearly rent of 50*l.* to George Hastings, the original lessor. The appellants had, as assignees of the lease to Gurney Hanbury, a lease of the premises for the unexpired portion of the term of thirty-nine and a half years, commencing June 24, 1885, less ten days; and Bishop had, as assignee of Aslett's sub-lease, a sub-lease of the premises for the same period of years less twenty-one days.

The definition of "owner" in the 141st section of the statute above referred to is as follows:—

"The expression 'owner' means the person for the time being receiving the rack-rent of the premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such premises were let at a rack-rent."

The expression "rack-rent" by the same section is defined to be "rent which is not less than two-thirds of the full annual value of the premises out of which the rent arises, and the

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full annual value shall be taken to be the annual rent which a tenant might reasonably be expected, taking one year with another, to pay for the premises if the tenant undertook to pay all usual tenants' rates and taxes, and tithe commutation and rent-charge (if any), and if the landlord undertook to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the premises in a state to command such rent."

It appears to us to be clear, from the facts stated in the case, that none of the parties interested in the premises, No. 73, Wyndham Road, could be said to be receiving a rack-rent within the meaning of the 141st section, and the counsel for the respondent did not seriously dispute this. What he contended, and what the Court of Quarter Sessions held, was that the appellants were "owners" of No. 73, because they were the persons who, in the terms of the latter part of the same section, "would so" (i.e., either on their own account or as agents or trustees) "receive the same" (i.e., the rack-rent) "if such premises were let at a rack-rent," and therefore the single question for our determination is whether or not this contention is well founded.

In our opinion the Court of Quarter Sessions was wrong in holding the appellants to be "owners" within the meaning of this enactment. It appears to us to be impossible to treat as the person who would receive the rack-rent, if the premises were let at a rack-rent, persons who, at the time when the "owner" of premises, as defined by the 141st section, has to be found, have not such an interest in the property that, if it was let at a rack-rent, they would receive such rack-rent. The words of the section in our judgment, in the case of there being no one who in fact receives a rack-rent from the actual occupier, designate as "owner" the person who "rebus sic stantibus," that is to say, with the interests in the premises as they then are, would, if they were let to an occupier at a rack-rent, receive that rack-rent.

In this case, whilst the sub-lease to Aslett subsists, that is to say, for the next thirty and a half years and until a date only eleven days anterior to the expiring of the appellants' own interests, the appellants could not let to any one. The only person who could let the premises at a rack-rent, the only person whose interest in

the premises places him in a position to receive a rack-rent, is Bishop, the assignee of the sub-lease to Aslett. His interest as assignee of that sub-lease gives him the power of so letting; and if the premises were so let, he is the person who would receive the rack-rent. He chooses, it is true, to occupy the premises himself; but we see nothing to prevent the same person being both occupier of the premises and the "owner" within the meaning of this section. The cases referred to in the course of the argument before us, *Bowditch* v. *Wakefield Local Board* (1) and *Wright* v. *Ingle* (2), in which questions as to the meaning of the term "owner" in similar provisions of the Public Health Act, 1848, and the Metropolis Local Management Act, 1855, are raised, are not decisions directly in point; but there are passages in some of the judgments in those cases which appear to us, to some extent at least, to support the conclusion to which we have come in this case. The decision of the Court of Queen's Bench (Blackburn, Quain, and Archibald, JJ.), in *Poplar Board of Works* v. *Love* (3), which was not referred to in the argument before us, also in our judgment supports that conclusion.

For the reasons which have been stated, we are of opinion that the decision of the Court of Quarter Sessions was not correct, and that the question of law raised in the case must be answered in favour of Truman, Hanbury, Buxton & Co., Limited, and that the decision of the Court of Quarter Sessions and the conviction by the magistrate must be quashed.

Judgment for the appellants.

Solicitors for appellants: *Clapham, Fitch & Co.*
Solicitors for respondent: *Marsden & Son.*

(1) Law Rep. 6 Q. B. 567. (2) 16 Q. B. D. 379.
(3) 29 L. T. (N.S.) 915.

A. P. P. K.

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Aug. 4.

FORDOM, APPELLANT; PARSONS, RESPONDENT.

Local Government — Local Authority — Sewers — Nuisance — Duty of Local Authority to provide for Sewage—Liability of Owner of Property Discharging Sewage into Sewer vested in Local Authority—Public Health Act, 1875 (38 & 39 *Vict.* c. 55), ss. 13, 15, 94, 95, 96.

The respondent and other persons, without the knowledge of the sanitary authority of the district, connected their water-closets with a drain belonging to such authority, being the only drain available for that purpose. A nuisance having been caused thereby, the sanitary authority took proceedings under ss. 94, 95, and 96 of the Public Health Act, 1875, against the respondent alone, to obtain an order for the abatement of the nuisance. It was not proved that the sewage from the respondent's premises alone caused the nuisance. Twenty years had elapsed since the respondent's water-closets were connected with the drain. The sanitary authority had not carried out any system of drainage to provide for the disposal of the sewage within their district:—

Held, that, as s. 15 of the Public Health Act, 1875, imposed upon the sanitary authority the obligation to provide such sewers as might be necessary for effectually draining their district for the purposes of the Act, they could not evade that obligation by taking those proceedings against the respondent, and therefore that the justices to whom the complaint of such authority was made were right in dismissing it.

CASE stated, under the Summary Jurisdiction Acts, by two justices of the county of Buckingham.

The appellant, as inspector of nuisances for the rural sanitary authority of the Wycombe Union, preferred a complaint before the justices, under s. 95 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), alleging that at Princes Risborough, within the district of such authority, there existed a nuisance arising from certain water-closets being connected with a certain drain or sewer, and that such nuisance was caused by the act, default, or sufferance of the respondent, as owner of certain premises there; that notice had been served upon the respondent requiring him to abate the nuisance, and to execute certain works and do certain things necessary for that purpose—namely, to disconnect his water-closets from the drains, and to make other provisions for the soil therefrom—and that the respondent had made default in complying with that notice.

The following material facts were proved or admitted on the hearing of the complaint:—

In 1863 there was in the High Street, Princes Risborough, an open drain into which drained the surface water from the highway and the sink drainage from the houses near thereto, but no water-closets then drained into it. The open drain becoming from time to time a nuisance, the authority covered it up, and laid down earthenware pipes in the drain for the purpose, as was alleged, but not proved, by the appellant, of conveying surface and sink water, and made a special rate to defray the expenses of the same. The respondent and other persons, from time to time, without the knowledge of the sanitary authority, connected their water-closets with the drain so made. The respondent's water-closets were so connected more than twenty years ago. A nuisance existed at a certain ditch in the parish of Princes Risborough, into which ditch the drain or sewer before-mentioned discharged itself at some distance from the respondent's premises. Such nuisance was caused by the sewage from the water-closets and the sink drainage coming from the properties of the respondent and other persons. Those other persons had promised to disconnect their water-closets from the drain or sewer, and consequently were not brought before the Court. It was not proved that the respondent alone caused the nuisance. The sanitary authority had made no by-laws or regulations for their district within the meaning of s. 21 of the Public Health Act, 1875, or otherwise; nor had they carried out any system of drainage therein, cesspools or earth closets being generally used by the inhabitants. It was admitted by the appellant that the drain in question was a sewer, and that the respondent was entitled to drain into the same.

The justices dismissed the complaint.

The question for the opinion of the Court was, whether the justices ought to have made an order upon the respondent to abate the nuisance by disconnecting his water-closets from the drain or sewer, and by making other provision for the soil from the same water-closets.

Forbes, Q.C. (*R. Cunningham Glen*, with him), for the appellant. The justices had no power to refuse to make the order. Admitting that the respondent was legally entitled to discharge the sewage

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from his water-closets into the sewer or drain constructed by the sanitary authority, if by so doing he causes a nuisance he is liable to the proceedings provided by ss. 94, 95 and 96 of the Public Health Act, 1875 (1): *Brown* v. *Bussell.* (2) In *Kirkheaton District Local Board* v. *Ainley, Sons and Co.* (3) the application was for an order, under the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), restraining the defendants from causing their sewage to flow into a stream. The Court of Appeal held that, under that Act, the making of the order was discretionary, and refused to interfere with the discretion exercised by the county court judge; but, as appears from the judgment of Bowen, L.J. (at p. 285), the case is wholly different where a

(1) Sect. 94: "On the receipt of any information respecting the existence of a nuisance the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act default or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose."

Sect. 95: "If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified, or if the nuisance, although abated since the service of the notice is, in the opinion of the local authority, likely to recur on the same premises, the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a court of summary jurisdiction."

Sect. 96: "If the Court is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises, the Court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; or an order prohibiting the recurrence of the nuisance and directing the execution of any works necessary to prevent the recurrence; or an order both requiring abatement and prohibiting the recurrence of the nuisance."

By s. 13, "All existing and future sewers within the district of a local authority, together with all buildings works materials and things belonging thereto, shall" (with certain specified exceptions) "vest in and be under the control of such local authority."

By s. 15, "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

(2) Law Rep. 3 Q. B. 251.

(3) [1892] 2 Q. B. 274.

compulsory duty is imposed by statute upon the local authority to take proceedings before justices for the abatement of a nuisance. Under those circumstances it is no answer to say that the local authority is itself in default. The *Kirkheaton Case* (1) is an authority for the proposition that under the circumstances existing in the present case the respondent is liable as a person by whose act the nuisance has been caused.

Poland, Q.C. (*Macmorran*, with him), for the respondent. The sanitary authority are alone responsible for the existence of the nuisance, and they cannot evade that responsibility by putting it upon the respondent. The case finds that for more than twenty years he and other adjoining owners of property have, as it is admitted they were legally entitled to do, discharged their sewage into the only existing sewer. That sewer is vested in and under the control of the local authority by virtue of s. 13 of the Public Health Act, 1875. By s. 15 they are bound to keep in repair all sewers belonging to them, and to cause to be made such sewers as may be necessary for effectually draining their district for the purposes of the Act. A passage from the judgment of Palles, C.B., in *Molloy* v. *Gray* (2) may be adopted as the short argument for the respondent here. He says (at p. 281): "I concede that the appellant by permitting soil to flow from the water-closet into the public sewer is a person by whose act the sewage has got into the sewer, and consequently that she may be said to have caused that accumulation in that place. That, and no more than that, was established in *Brown* v. *Bussell.* (3) But although in such a case the act must be considered the act of the party, still if that act is authorized by the legislature, and done in the mode contemplated by the legislature, it is not illegal, and consequently not the subject of action or prosecution." In *Kirkheaton District Local Board* v. *Ainley, Sons & Co.* (1), Lord Esher, M.R., during the argument said (at p. 277): "These sewers had vested in the plaintiffs. A local board is bound to provide their district with the necessary sewers under the Public Health Act, 1875, and to provide properly for the disposal of the sewage. The Chancery Division seems to

(1) [1892] 2 Q. B. 274. (2) 24 L. R. Ir. 258.
(3) Law Rep. 3 Q. B. 251.

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have held that the defendants were entitled to connect with these sewers. Under these circumstances is it not the plaintiffs themselves who cause the sewage to fall into the stream?" and Bowen, L.J. (at p. 278), says: "This order is in effect an injunction. Ought the Court to grant an injunction at the suit of those who really themselves cause the mischief by not performing their duty of providing for the sewage?" The passage from the judgment of Bowen, L.J., which is relied on for the appellant, is obiter. In the judgment of A. L. Smith, L.J. (at p. 288), the learned judge says: "Is it just and right that, where there are two offenders, one should be able to come to the Court and get the yoke off his neck and put on the neck of the other? I agree that it is not." Those observations apply exactly to the case now before the Court.

MATHEW, J. I am clearly of opinion that this appeal must be dismissed. The plain facts are that the rural sanitary authority has created the sewer, which turns out to be insufficient for the purpose for which it was created; and it is said that instead of obeying the Public Health Act, 1875, by performing the duty which s. 15 has imposed upon them, they can be relieved of all their obligations under that section by calling on the unfortunate householders in their district to cease to use the system of drainage already provided. The respondent, who has for years, it is admitted, been legitimately and lawfully using the drain or sewer provided by the sanitary authority, finds proceedings instituted against him requiring him to cut off communication with the drain. In name this is a proceeding for the prevention of a nuisance; but, if the order asked for were made, the strong probability is that a far greater nuisance would arise than the one now complained of. Now, was it intended by the Act of Parliament that a local authority should have recourse to such a method of procedure in reference to an existing drain or sewer? Apart from the statute itself the proposition has only to be stated to condemn itself by its manifest absurdity. But though absurd and preposterous as a proposition, counsel for the appellant is quite entitled to argue that it is the law—that, although the local authority is compelled to acknowledge that it has not

performed its duty, and that a mandamus would issue against it compelling the performance of that duty, nevertheless it is entitled to institute proceedings of this nature. Mr. Forbes relies for his contention upon *Brown* v. *Bussell.* (1) It is sufficient for the purposes of this case to point out that there the nuisance was traced to the individual who was proceeded against; it was a different case to this. Cockburn, C.J., begins his judgment by saying: "If the nuisance were caused by the joint contribution of different persons in such a way as that the contribution of each would not in itself cause a nuisance, though the aggregate amounted to a nuisance, I should hesitate to hold that it would be competent to the justices to make an order prohibiting each person who contributes. But I understand that, in the first case, the quantity of matter contributed by the appellant alone in itself creates a nuisance." The judgment proceeds upon that view of the case; but here the justices have carefully abstained from any such finding; indeed, they have, I think, found the contrary—that the respondent's contribution would have caused no nuisance whatever. That authority, therefore, does not apply. Then Mr. Forbes referred to a later authority: *Kirkheaton District Local Board* v. *Ainley, Sons & Co.* (2) He referred to the judgment of the Court of Appeal in that case, and pointed out that there the application was in the circumstances, so far as the local board were concerned, very nearly the same as here. There the proceedings were taken under the Rivers Pollution Act, 1876, and Bowen, L.J., pointed out the view, which was ultimately adopted by the Court, that whatever might be the case under any other circumstances, there the matter was purely discretionary, and, therefore, that it was wrong to make the order asked for, which was practically an injunction. But the decision is by no means to the effect that a local board of health can shirk its obligation by proceedings such as have been taken in this case. The whole of the reasons given point to a different conclusion. It was not necessary in that case to say that the proceedings taken by the board were obligatory, because, as the Court pointed out, the particular order asked for was one which the county court or the Court of Appeal, if it confirmed the

(1) Law Rep. 3 Q. B. 251. (2) [1892] 2 Q. B. 274.

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decision of the county court, could make, or refuse to make, in its discretion.

I decide this case upon the ground that s. 15 of the Public Health Act, 1875, clearly imposes an obligation upon the rural sanitary authority, and that they cannot by any such proceeding as this shirk that obligation, and transfer it to those for whose protection they are called into existence as a local authority. Our judgment must be for the respondent.

LAWRANCE, J. I entirely agree, for the same reasons.

Judgment for the respondent.

Solicitors for appellant: *Lovell, Son & Co., for Reynolds & Son, High Wycombe.*

Solicitors for respondent: *Letts Brothers, for Parker & Wilkins, High Wycombe.*

W. A.

1894 *Aug.* 8.

IN RE BEDFORDSHIRE COUNTY COUNCIL AND BEDFORD URBAN SANITARY AUTHORITY.

Local Government—County Council—Urban Authority electing to maintain Main Roads—Amount to be Paid by County Council—Arbitration by Local Government Board—Local Government Act, 1888 (51 *&* 52 *Vict. c.* 41), *ss.* 11, 35.

Where an urban authority has claimed, under s. 11, sub-s. 2, of the Local Government Act, 1888, to retain the powers and duties of maintaining the main roads within its district, the amount to be paid to such urban authority by the county council in respect of such main roads can only be settled, in default of agreement, by the arbitration of the Local Government Board.

CASE stated by the chairman of the Bedfordshire County Council and the mayor of the borough of Bedford for the opinion of the High Court under s. 29 of the Local Government Act, 1888.

The mayor, aldermen and burgesses of the borough of Bedford acting by their council are for the purposes of the Public Health Act the urban sanitary authority for that borough. At the time of the passing of the Local Government Act, 1888, the borough had (according to the census of 1881) a population of upwards of 10,000 and a separate court of quarter sessions.

Within twelve months after the day appointed under the Local Government Act the town council of the borough resolved, in pursuance of the powers conferred by s. 11, sub-s. 2, and s. 35, sub-s. 4, of that Act, to retain the powers and duties of maintaining and repairing the main roads within the borough. Such main roads include some of the principal streets of the borough, and a considerable portion of the traffic to which they are subject is of a purely local character.

Until the expiration of the year ending December 6, 1891, the annual amount to be paid by the Bedfordshire County Council towards the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of the said main roads was paid by agreement between the Bedfordshire County Council and the town council of the borough. In the month of December, 1892, the town council made a claim upon the county council in respect of the costs alleged to have been incurred in respect of the maintenance and repair, and reasonable improvement connected with the maintenance and repair, of the said main roads during the year ending December 6, 1892. The county council and the town council failed to agree as to the amount to be paid by the county council in respect of such claim, the town council contending that, under s. 11, sub-s. 2 and s. 35, sub-s. 3, of the Local Government Act, 1888, they were entitled to receive the entire amount expended in the maintenance and repair and reasonable improvement connected with the maintenance and repair of such main roads subject to the county council being able to dispute any item which was improper or unreasonable, and the county council contending that they were not necessarily liable to pay the whole amount expended by the town council, but only such an amount towards such costs as should be agreed between them, or, in default of agreement, as should be determined by the Local Government Board under s. 11, sub-s. 3, having regard to the circumstances of each particular road.

The questions submitted to the Court were:—

(1.) Whether upon the true construction of the sections the contention of the town council or of the county council was correct.

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(2.) If that of the county council was correct, whether the amount of the payment to be made by the county council was in their discretion, subject only to the arbitration of the Local Government Board in case of dispute, or upon what principle the amount should be determined. (1)

Macmorran, for the town council. The county council are bound to pay to the urban authority the whole costs incurred in the maintenance and repair, and in the reasonable improvement connected with the maintenance and repair, of the main roads

(1) By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 11:—

"(1.) Every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878 . . . . shall after the appointed day be wholly maintained and repaired by the council of the county in which the road is situate. . . ."

"(2.) Provided that any urban authority may within twelve months after the appointed day . . . . claim to retain the powers and duties of maintaining and repairing a main road within the district of such authority, and thereupon they shall be entitled to retain the same . . . . and the council shall make to such authority an annual payment towards the costs of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of such road."

"(3.) The amount of such payment shall be such annual sum as may be from time to time agreed on, or in the absence of agreement may be determined by arbitration of the Local Government Board."

By s. 35: "In the case of a quarter sessions borough . . . . containing according to the census of 1881 a population of 10,000 or upwards, the following provisions shall, on and after the appointed day, apply:—

"(3.) . . . . the borough shall for the purposes of the provisions of the Highways and Locomotives (Amendment) Act, 1878, respecting main roads, form part of the county, and the costs of maintaining, repairing, improving, enlarging, or otherwise dealing with any main road in the borough shall be paid out of the county fund, and the payment of the costs incurred in the execution of the provisions of this Act with respect to main roads shall be a general county purpose for which the parishes of the borough may be assessed to county contributions."

"(4.) Provided that. . . . (B.) The council of the borough shall have power as an urban authority to claim in accordance with this Act to retain the powers and duties of maintaining and repairing any main road in the borough."

By s. 29: "If any question arises or is about to arise as to whether any business, power, duty or liability is or is not transferred to any county council or joint committee under this Act, that question, without prejudice to any other mode of trying it, may on the application of a chairman of quarter sessions or of the county council committee or other local authority concerned be submitted for decision to the High Court of Justice in such summary manner as subject to any Rules of Court may be directed by the Court."

within their district. By s. 13 of the Highways and Locomotives (Amendment) Act, 1878, one half of the expenses incurred in the maintenance and repair of main roads was to be borne by the county authority. The Local Government Act, 1888, by s. 11, sub-s. 1, makes the county council liable for the whole burden of the main roads throughout the county, and it also makes, by s. 35, sub-s. 3, a quarter sessions borough liable to contribute to the maintenance and repair of main roads generally in the county. Unless the urban authority under s. 11, sub-s. 2, and s. 35, sub-s. 4, elect to retain their powers of maintaining and repairing the main roads within their district, the whole burden and expense of so doing fall on the county council; and, therefore, it is unreasonable that the county council should not repay to the town council the costs properly incurred by them in such maintenance and repair. That was the view taken by the Court in *Marlborough Town Council* v. *Wilts County Council.* (1)

Joseph Walton, Q.C., and *C. M. Atkinson*, for the county council, were not called upon to argue.

MATHEW, J. It seems to me that we are not the proper tribunal to have recourse to in such a case with respect to a question of amount. The question arises between the county council of Bedfordshire and the urban sanitary authority for the borough of Bedford with respect to expenses incurred in reference to certain main roads within the borough; and the urban sanitary authority claim that they are entitled to receive from the county council the whole of the expenses that they have incurred. They contend that under s. 11, sub-s. 2, and s. 35, sub-s. 3, of the Local Government Act, 1888, they are entitled to receive from the county council the entire amount of the costs expended in the maintenance and repair and reasonable improvement connected with the maintenance and repair of these main roads, subject to the county council being able to dispute any item which is improper and unreasonable. The county council, on the other hand, contend that they are not necessarily liable to pay the whole amount expended by the urban sanitary authority, but only such an amount towards such costs as may be agreed

(1) 58 J. P. 213.

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upon or (in default of agreement) as may be determined by the Local Government Board under s. 11, sub-s. 3, having regard to the circumstances of each particular road. The section seems to me to be quite clear. The legislature plainly contemplated the case ordinarily arising in which it would not be fair that the whole amount incurred in respect of repair and maintenance should be paid by the county council, although it would certainly be just that some part should be cast upon the county council. The Act does not however exclude cases where the whole amount of costs incurred might be paid by the county council. Sect. 11, sub-s. 3, creates machinery by which all such questions of amount can be settled. The two parties are from time to time to agree on an annual sum, and if they cannot agree the amount of the payment is to be determined by the arbitration of the Local Government Board. It is said that there is some dissatisfaction with these arbitrations. That, I think, is generally the case. Whether there is ground for dissatisfaction or not, we can only say now that the contention of the county council is right as against that of the urban sanitary authority. A question of amount has arisen here, and the only mode of determining it is that pointed out by the Act, namely, by the arbitration of the Local Government Board.

KENNEDY, J. I agree. It seems to me that it is sought in this case to get us to do what we have no power to do, and to induce us to interfere with the powers of the Local Government Board, and to express an opinion which will limit the discretion of the arbitrators appointed by it to settle and determine these questions of amount. The scheme of the Act clearly is that, in default of an arrangement between the parties, there must be an application to the Local Government Board to arbitrate between them, and to determine the proper amount to be paid.

Judgment for the county council.

Solicitors for county council: *F. Venn & Co., for Marks, Bedford.*

Solicitors for urban sanitary authority: *Ullithorne, Currey, & Currey, for T. S. Porter, Bedford.*

A. P. P. K.

FRODINGHAM IRON AND STEEL COMPANY *v.* BOWSER. 1894 *Aug. 7.*

Highway—Surveyor—Liability—Debt incurred by Surveyor's Predecessor—Highway Act, 1835 (5 & 6 *Wm.* 4, *c.* 50).

An action does not lie against a surveyor of highways, appointed under the Highway Act, 1835, for the price of materials sold or supplied to his predecessor for the repair of the highways in the parish, where such predecessor has died insolvent after having received from the parish moneys sufficient to pay for such materials.

SPECIAL CASE, stated under Order XXXIV. r. 1, in an action. The claim was to recover the price of materials sold and delivered by the plaintiffs to and for the use of the parish of Sibsey, in the county of Lincoln, of which parish the defendant was and is the surveyor of highways appointed under sect. 6 of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50).

In 1893 the materials in question were ordered from the plaintiffs by one Harrison, and delivered by them to him for the purpose of mending the roads in such parish, Harrison then being the surveyor of highways therein. The whole of the materials was used upon such highways. Harrison died in July, 1893. At the time of his death he should have had in his hands moneys of the parish more than sufficient to pay the sum due to the plaintiffs.

The defendant was appointed surveyor of highways in succession to Harrison upon his death. Harrison's estate was found to be insolvent, and the defendant never received any of the moneys of the parish which should have been in Harrison's hands.

The question for the opinion of the Court was, whether the defendant, as such surveyor for the time being of the parish or otherwise, was liable under the circumstances to pay to the plaintiffs the sum claimed in the action.

If the Court should be of opinion in the affirmative, then judgment was to be entered for the plaintiffs for the amount claimed and costs; if in the negative, then judgment was to be entered for the defendant with costs.

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Travers Humphreys, for the plaintiffs. The plaintiffs are entitled to maintain this action against the defendant. By s. 46 of the Highway Act, 1835, the surveyor is empowered to make contracts on behalf of the parish for the materials necessary for the repair of the highways. The parish, therefore, becomes liable to pay for such materials, and the proper person to sue is the surveyor for the time being. By s. 43 he can recover from the executors of a deceased surveyor moneys which have been received by him by virtue of the Act, and have not been fully paid and satisfied. The surveyor can also recover from the parish moneys which he has been compelled to pay in respect of liabilities contracted by his predecessor, if the estate of the latter is insolvent. By s. 27 a surveyor may make a rate "in order to raise money for carrying the several purposes of this Act into execution." The plaintiffs cannot recover from Harrison's executors because the estate is insolvent, and they are left without remedy unless they can sue the defendant.

A. Macmorran, for the defendant. This action does not lie. There is no authority, statutory or otherwise, for saying that a surveyor of highways can be sued for a debt contracted by his predecessor, who has received from the parish moneys sufficient to discharge that debt. The principle of rating for the repair of the highways is that the rate must be made and liabilities discharged in the year in which they have been incurred. Here the deceased surveyor has made a rate, and received moneys from the parish with which to discharge the plaintiffs' claim. The parish, therefore, have paid already, and cannot be required to pay over again. Sect. 43 of the Highway Act, 1835, only applies where the executors of a deceased surveyor have estate and effects in their hands out of which to pay what he has received from the parish and not accounted for. Here they have not. It needed a special statutory provision—namely, that contained in the Highway Rate Assessment and Expenditure Act, 1882 (45 & 46 Vict. c. 27), s. 5—to enable a surveyor of highways to reimburse his predecessor, where the sums received by him in respect of his office have proved insufficient to meet the whole of the expenditure lawfully incurred. In the absence of any statutory pro-

vision making a surveyor liable for the debts incurred by his predecessor in respect of his office, it is clear that the surveyor is not liable.

Travers Humphreys, replied.

MATHEW, J. In this case I am of opinion that the action does not lie. It is brought to recover against a surveyor of highways in respect of a liability incurred by his predecessor. The scheme of the Act is clear enough. The surveyor is empowered, with the consent of the inhabitants of the parish, to make contracts for purchasing the materials required for the repair of the highways, and he may make a rate on the inhabitants for the purpose of paying for those materials. The persons from whom the materials are ordered are not compelled to give him credit; they may, if they choose, ask for ready money. When the rate is made and levied the parish have already provided the money for payment. In the present case the defendant's predecessor was a defaulting debtor. He did not pay out of the money in his hands for the materials which he had ordered. He died insolvent, and there being no assets which could be handed over to his successor, the plaintiffs, instead of bringing the action against his executors, sued his successor, the defendant. The only ground upon which, it is said, that the statute imposes the liability on the defendant is that, by s. 43, he is empowered to sue the executors of his predecessor for moneys in their hands belonging to the parish. There is, however, nothing in the Act to impose that liability. Sect. 5 of the Highway Rate Assessment and Expenditure Act, 1882, specially provides for the reimbursement of a surveyor by his successor, but there is no statutory provision that the successor should be liable in a case like the present. No authority to support the proposition that such an action as this lies against a surveyor of highways has been cited. I am of opinion, therefore, that our judgment should be for the defendant.

KENNEDY, J. I agree. I am of opinion that in the absence of any statutory right to bring the action, and in the absence of

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any authority to support the proposition that it may be brought, this action does not lie.

Judgment for the defendant.

Solicitors for plaintiffs: *Clarkson, Greenwells, & Co., for John Barker, Grimsby.*

Solicitors for defendant: *Hughes & Sons, for Walker, Sons, & Rainey, Spilsby.*

W. A.

1894
Aug. 2.

DYER, APPELLANT; TULLEY, RESPONDENT.

Revenue—Excise—Proceedings to Recover Penalties—Information—Court of Summary Jurisdiction—Officer of Inland Revenue—Proof of Authority to take Proceedings—7 & 8 Geo. 4, c. 53, s. 71—Inland Revenue Regulation Act, 1890 (53 & 54 *Vict. c.* 21), *ss.* 21, 24.

By 7 & 8 Geo. 4, c. 53, s. 71, where, in an information for excise penalties under that or any other Act, any allegation is made that the Commissioners of Excise had ordered such information to be exhibited, such allegation shall be sufficient proof, without any further or other evidence, of the fact so alleged. By the Inland Revenue Regulation Act, 1890, s. 21, proceedings shall not be commenced against any person for the recovery of any penalty under any Act relating to Inland Revenue, except by order of the commissioners; and, by s. 24, in any proceeding the letter or instructions under which an officer has acted shall be sufficient evidence of any order issued by the commissioners and mentioned or referred to therein.

Where proceedings to recover an excise penalty were taken by an officer of Inland Revenue before a court of summary jurisdiction:—

Held, that the provisions of s. 71 of the Act of Geo. 4 were not impliedly repealed by ss. 21 and 24 of the Act of 1890, and therefore an allegation in the information that the officer prosecuted by order of the commissioners was sufficient proof of such order without further or other evidence.

CASE stated, under 42 & 43 Vict. c. 49, by two justices of the county of Devon.

The respondent was summoned to appear before a court of summary jurisdiction upon an information, preferred by the appellant, an officer of Inland Revenue, charging the respondent with having killed game without having in force the licence required by the statutes in that behalf.

The information alleged that the appellant prosecuted for Her Majesty in that behalf by order of the Commissioners of Inland Revenue.

At the hearing of the information before the justices no

order of the Commissioners of Inland Revenue authorizing the commencement of the proceedings against the respondent was produced or proved. The appellant was present; but H. F. D. West, who produced his commission as a supervisor of Inland Revenue, but did not produce any other authority, claimed the right to conduct the prosecution as an advocate. The justices refused to allow West to conduct the prosecution, on the ground that he had no right or authority so to do under s. 27 of the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21) (1), because that section required that an officer should have a special authority expressly authorizing him to conduct the particular proceedings mentioned therein. West thereupon refused to allow the appellant, who was his subordinate officer, to conduct the prosecution; and, no evidence being tendered for or on behalf of the appellant, the justices dismissed the information.

The Queen's Bench Division (Cave and Wright, JJ.), upon a case stated by the justices, held that West was entitled to conduct the prosecution, and the case was sent back with an intimation that the justices ought to hear and determine the information.

The justices accordingly heard the information again.

It was proved that the respondent did, on the date named in the information, kill game, and he failed to prove that he had in force at that date any licence or certificate authorizing him to kill game, as required by the statutes in that behalf.

The justices again dismissed the information, being of opinion that the statement in the information that the appellant prosecuted by order of the Commissioners of Inland Revenue was not sufficient evidence that an order for the commencement of the proceedings had been obtained as required by the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21), s. 21,

(1) By s. 27: "Any officer or person employed or authorized by the Commissioners or the Solicitor of Inland Revenue in that behalf may, although he is not a solicitor, advocate, or writer to the signet, prosecute, conduct, or defend any information, complaint, or other proceeding to be heard or determined by any justice of the peace of the United Kingdom . . . where the proceeding relates to Inland Revenue or to any fine, penalty, or other matter under the care and management of the commissioners."

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sub-s. 1 (1), and that the proper evidence of such an order having been made was the production of the letter or instructions under which the appellant had acted, as prescribed by s. 24, sub-s. 2.

The material question for the opinion of the Court was whether the statement in the information that the appellant prosecuted by order of the commissioners was, of itself, sufficient evidence that the order authorizing the commencement of the proceedings required by s. 21, sub-s. 1, of the Inland Revenue Regulation Act, 1890, had been obtained.

The Attorney General (*Sir John Rigby, Q.C.*), (*Loehnis*, with him), for the appellant. The decision of the justices was wrong. The statement in the information that the appellant prosecuted by order of the commissioners clearly was sufficient proof of the order having been made. Sect. 24, sub-s. 2, of the Inland Revenue Act, 1890, only provides an additional mode of proving the order to prosecute; it does not repeal, nor is it in any way inconsistent with, the provisions of 7 & 8 Geo. 4, c. 53, s. 71. The point seems to have been decided by the Queen's Bench Division in *Hargreaves* v. *Hilliam.* (2)

No counsel appeared for the respondent.

(1) By 7 & 8 Geo. 4, c. 53, s. 71: "Where in any information for the recovery of any penalty . . . under this Act or any other Act or Acts of Parliament relating to the revenue of excise . . . any allegation or averment shall be made that such information was exhibited, or that the Commissioners of Excise . . . had ordered such information to be exhibited . . . such allegation and averment shall be, and the same respectively shall be deemed and taken to be, sufficient proof of such facts so alleged or averred respectively without any other or further evidence thereof."

By 53 & 54 Vict. c. 21, s. 21, sub-s. 1: "It shall not be lawful to commence proceedings against any person for the recovery of any fine, penalty, or forfeiture under any Act relating to Inland Revenue, or for the condemnation of any goods seized as forfeited under any such Act, except by order of the commissioners and in the name of an officer, or in England in the name of the Attorney General for England."

By s. 24, sub-s. 2: "In any proceeding the letter or instructions under which a collector or officer or person employed in relation to Inland Revenue has acted shall be sufficient evidence of any order issued by the Treasury or by the commissioners, and mentioned or referred to therein."

(2) 58 J. P. 364.

MATHEW, J. I am of opinion that the justices were wrong in dismissing the information. It is clear that the authority to commence the proceedings might either be proved by a statement to that effect in the information, under 7 & 8 Geo. 4, c. 53, s. 71, or by producing the letter or instructions mentioned in s. 24, sub-s. 2, of the Inland Revenue Act, 1890. The justices seem to have come to the conclusion that the provisions of the later Act had the effect of repealing those of the earlier. There is no reason whatever for coming to such a conclusion. The two enactments can easily be reconciled. They were intended to provide for the more easy conduct of cases of this description. The case, therefore, must go back to the justices with the intimation of our opinion that they ought to convict the respondent.

KENNEDY, J. I am of the same opinion.

Judgment for the appellant.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

W. A.

[IN THE COURT OF APPEAL.]

C. A.
1894
Aug. 3.

IN RE SLEET. EX PARTE SLEET.

Bankruptcy—Deceased Debtor—Order for Administration of Estate in Bankruptcy—Jurisdiction—Petition served before Legal Personal Representative appointed—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 125.

An order under s. 125 of the Bankruptcy Act, 1883, for the administration in bankruptcy of the estate of a deceased debtor may be made upon a petition served before the grant of probate or letters of administration, if, at the time of the making of the order, there is a duly constituted legal personal representative of the deceased before the Court.

APPEAL against an order made by one of the bankruptcy registrars for the administration in bankruptcy, under the provisions of s. 125 of the Bankruptcy Act, 1883, of the estate of William Sleet, who died intestate on May 8, 1894.

The petition was presented on June 8 by creditors who alleged that a debt of 391*l.* 13*s.* was due to them by the deceased. The petition alleged that Sleet died intestate, and that no

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administration had been granted in respect of his estate; that the business formerly carried on by the deceased had been from the time of his death and was still being carried on by his widow, and that she had possessed herself of his assets, or of some part thereof, whereby she had constituted herself an executrix de son tort of the deceased; and that his estate was insufficient to pay his debts.

On the application of the petitioners the registrar on the same day gave leave to serve the petition on the widow, as being "the person who has intermeddled with the assets of the deceased."

On June 22, 1894, the widow, having been served with the petition, gave notice of her intention to dispute at the hearing several of the statements contained in the petition, and, in particular, the statement that she had constituted herself executrix de son tort, and the statement that the estate of the deceased was insufficient for the payment of his debts.

On June 23, 1894, administration of the estate was granted to the widow.

On June 28, the petition was heard, and the registrar made the order for administration in bankruptcy.

Upon the hearing it was argued on behalf of the administratrix that, as at the date of the service of the petition no legal personal representative of the deceased had been constituted the Court had no jurisdiction to make the order for administration in bankruptcy.

The registrar overruled this objection, and, not being satisfied that there was a reasonable probability that the estate would be sufficient for the payment of the debts owing by the deceased, he made the order for administration.

The administratrix appealed.

There was evidence that at a meeting of creditors of the deceased, summoned by the widow, and held on June 21, a resolution was passed in favour of the winding up of the estate in the ordinary way, and not in bankruptcy.

There was also evidence that, if the estate were wound up in the ordinary course, the business being in the meantime carried on by the widow, the assets would probably be more than sufficient

to pay all the creditors in full. The petitioners said that they had had no notice of the meeting of creditors.

Herbert Reed, Q.C., and *Gregson Ellis*, for the appellant. There was no jurisdiction under s. 125 (1) to make the order, because

(1) By the Bankruptcy Act, 1883, s. 125: "(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

"(2.) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shewn, dismiss such petition with or without costs.

"(3.) An order of administration under this section shall not be made until the expiration of two months from the date of the grant of probate or letters of administration, unless with the concurrence of the legal personal representative of the deceased debtor, or unless the petitioner proves to the satisfaction of the Court that the debtor committed an act of bankruptcy within three months prior to his decease."

"(5.) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the Court, as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act."

"(9.) Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver; save as aforesaid, nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration.

"(10.) 'Creditor' means one or more creditors qualified to present a bankruptcy petition, as in this Act provided.

"(11.) General rules for carrying into effect the provisions of this section may be made in the same manner and to the like effect and extent as in bankruptcy."

By the Bankruptcy Rules, 1886, r. 276: "(1.) The petition shall, unless the Court otherwise directs, be served on each executor who has proved the will, or, as the case may be, on each person who has taken out letters of administration. The Court may also, if the Court thinks fit, order the petition to be served on any other person."

By the Bankruptcy Act, 1890, s. 21: "(1.) An order for the administration of a deceased person's estate may be

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at the date of the service of the petition no legal personal representative of the deceased had been constituted. The petition has never been served upon the widow as administratrix.

The resolution passed at the meeting of creditors shews what their wishes are, and regard should be paid to their wishes.

Muir Mackenzie, and *F. M. Abrahams*, for the petitioners, were not heard.

LORD ESHER, M.R. I think this case comes directly within the terms of s. 125, and that no valid objection can be raised to the petition on the ground that at the date of its service administration to the estate of the deceased had not yet been granted. The petition, therefore, came properly before the registrar, and he had to discharge the duty which is imposed upon him by sub-s. 2 of s. 125, the prescribed notice having been given to the widow, who had before the hearing become the legal personal representative of the deceased debtor. The registrar was therefore entitled to make an order for the administration of the estate in bankruptcy, unless he was satisfied that there was a reasonable probability that the estate would be sufficient for the payment of the debts owing by the deceased. It is admitted that the estate as it now stands is not sufficient for that purpose; but it is said that if the widow is allowed to carry on the testator's business, and to sell it as a going concern, there might be enough to pay all the creditors in full. It is not suggested that any one is ready to purchase the business, nor is it said that, if the business were carried on, there would be enough to pay the debts of the testator, and also the debts which would be incurred in carrying on the business. I am not surprised that the registrar was not satisfied that there was a reasonable probability of the solvency of the estate, and if the registrar's order were discharged any one of the other creditors might present a similar petition of his own. It is said that there has been a meeting of creditors, and that they have passed a resolution adverse to the administration

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made under s. 125 of the principal Act before the expiration of two months from the date of the grant of probate or letters of administration without the concurrence or proof mentioned in sub-s. 3 of that section."

of the estate in bankruptcy. This, however, was not a meeting in bankruptcy, and it is said that the petitioners had no notice of it. It was merely a meeting of friends of the widow. And, as we have often already said, it is the duty of this Court to see that creditors do not through carelessness commit some folly which will injure others as well as themselves. The registrar's order was rightly made, and the appeal must be dismissed.

KAY, L.J. I agree.

A. L. SMITH, L.J. So do I.

Appeal dismissed.

Solicitors: *Cooper & Bake; E. H. Quicke.*

W. L. C.

[IN THE COURT OF APPEAL.]

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July 30.

PRINTING TELEGRAPH AND CONSTRUCTION COMPANY OF THE AGENCE HAVAS, LIMITED *v.* DRUCKER.

Practice—Evidence taken in other Causes—Admissibility of such Evidence in subsequent Action—Order XXXVII., r. 3.

Order XXXVII., r. 3, as to the reading in any cause, either by leave or on notice, evidence taken in other causes or matters, has only the effect of doing away with the necessity for an order to read such evidence, and does not affect the admissibility of the evidence in the cause in which it is sought to read it.

APPEAL from an order of the Queen's Bench Division confirming an order made at Chambers for the issue of a commission to examine witnesses in Paris on behalf of the defendant.

The action was brought to recover calls, and the defence was that the defendant was induced to become a shareholder by fraud and misrepresentation in the prospectus of the plaintiff company.

It appeared that the plaintiffs had brought a similar action against another shareholder, and that witnesses had been examined in Paris on a commission obtained on behalf of the defendant in that action. It was desired in the present action to examine the same witnesses, and it was objected on the part of the plaintiffs that the commission was not necessary on the

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ground that the evidence taken in the former action could be read in this action under Order XXXVII., r. 3, which says: "An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on ex parte applications by leave of the Court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."

An order for the issue of a commission was made at Chambers, and this order was confirmed by the Queen's Bench Division.

The plaintiffs appealed.

Buckley, Q.C., and *Edward Ford*, for the plaintiffs. The evidence sought to be obtained under this commission is already in existence, and it is not shewn that the witnesses could add anything to it on a second examination. The order is discretionary, and no necessity is shewn for the commission. The wording of Order XXXVII. is quite wide enough to cover this case, and the defendant could give notice of his intention to read the evidence taken in the former action. There are a number of similar actions against shareholders, and in each case the issue whether the prospectus was fraudulent is the same. The plaintiffs ought not to be put to the expense of attending a separate commission in each case.

Horne Payne, Q.C., and *Bremner*, for the defendant, were not called on.

LORD ESHER, M.R. This is an action for calls, and by way of defence the defendant asserts that he was induced to become a shareholder in the company by false and fraudulent misrepresentations. He asserts that to support this defence it is material that he should examine on commission in Paris various witnesses whose names he gives. The plaintiffs say that the commission ought not to go because the witnesses have been examined as to these same matters in a similar action against another shareholder. It is said that the commission is not under these circumstances necessary, because the Court or a judge may give

leave that the evidence so taken should be read in the present action, or the defendant may give notice of his intention to read it. I think it is clear this could not be done, and that the case does not come within Order XXXVII., r. 3. The parties in the two actions are not the same, and the issues are not the same. The issue in each case was not merely whether the statements in the prospectus were false and fraudulent, but whether the defendant was induced by false and fraudulent statements to become a shareholder. The rule does not make that evidence which is not by law evidence, and the evidence taken in the former action is not admissible in the present one. The ground, therefore, on which the opposition to the application for a commission was based fails, and the appeal must be dismissed.

KAY, L.J. The Divisional Court have affirmed the order for a commission to examine witnesses in Paris on behalf of the defendant. The plaintiffs say that the commission ought not to have been ordered, because the witnesses have been already examined on commission, and the evidence so taken is available to the defendant in the present action. I am clearly of opinion that it is not possible to make that evidence available in this action. The rule as to reading evidence taken in another action was, that the two suits should be virtually between the same parties or their privies. This has been extended to cases where the interests of the parties in the second action were represented in the earlier one to which they were not parties, as, for instance, in the case of legatees or tenants in common. The Court, if satisfied that the issues were the same and that the parties came within the description I have given, could make an order that the evidence taken in the former action might be read in the subsequent one, but would only do so if all these conditions existed. Order XXXVII., r. 3, was made to do away with the necessity for an application for an order that the evidence should be read, and for that reason only. It has not affected the admissibility of evidence, and no evidence taken in another cause or matter can now be read by leave or on notice, unless before this rule an order could have been obtained that it should

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be read in the existing action. The objection to the order for a commission is not well founded, and the order of the Divisional Court is right.

A. L. SMITH, L.J. I am of the same opinion. The law as to reading in one action a deposition taken in another is thus stated by Lord Cottenham in *Humphreys* v. *Pensam.* (1) "Depositions can only be read for or against those who are parties or privies to the suit in which the depositions were taken; and they cannot be read for a party, unless they could also be read against him." In this case the defendant was not party or privy to the former action, and it is abundantly clear that the deposition in the former action could not be read against him. Under the law as it stood before Order XXXVII., r. 3, the deposition in the former action would not have been admissible in the present one, and that rule has not affected the matter. The rule was made simply for the purpose of doing away with the necessity for an order to read evidence taken in other actions, and has not in any way altered any question as to the legitimacy of evidence.

Appeal dismissed.

Solicitors for plaintiffs: *Beyfus & Beyfus.*
Solicitors for defendant: *Ashurst, Morris, Crisp, & Co.*

(1) 1 My. & Cr. 580, at p. 586.

A. M.

[IN THE COURT OF APPEAL.]

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July 6.

IN RE LAMB. EX PARTE THE BOARD OF TRADE.

Bankruptcy—Appointment of Trustee—Objection by Board of Trade—Notification to High Court—Right of Appeal from Decision of High Court—Locus standi—"Person aggrieved"—One Trustee appointed of Estates of Two Bankrupts—Conflicting Interests—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 21, 104.

By s. 21 of the Bankruptcy Act, 1883, (2.) the Board of Trade, if satisfied with the security given by the person appointed by the creditors to be trustee of the property of a bankrupt, "shall certify that his appointment has been duly made, unless they object to the appointment on the ground that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally." And (3.) "Where the Board make such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity."

Held, that an appeal lies to the Court of Appeal from such a decision of the High Court, and that, if the High Court decides that the objection is invalid, the Board of Trade are "aggrieved" by the decision, and may appeal against it.

E. having been adjudicated a bankrupt, the creditors appointed G. to be trustee in the bankruptcy. L. was afterwards adjudicated a bankrupt, and the creditors appointed G. to be trustee. G. was a creditor of E. for 3000*l.*, and he was also a creditor of L. for 400*l.* The principal asset of L. consisted of a property as to a moiety of which E. asserted that L. was a trustee for him. L. repudiated this claim. The Board of Trade certified that G. had been duly appointed trustee of E.'s estate; but they objected to his appointment as trustee of L.'s estate, on the ground "that his connection with or relation to L. and his estate makes it difficult for him to act with impartiality in the interests of the creditors of the bankrupt generally." The objection was notified to the High Court under s. 21 (3).

Held, by the Court of Appeal, reversing the decision of Vaughan Williams, J., that, inasmuch as, if G. were appointed trustee of both the estates, there would be a serious conflict between his interest as a creditor of E. and his duty as trustee of L.'s estate, the objection of the Board of Trade was valid.

NOTIFICATION to the High Court by the Board of Trade, under sub-s. 3 of s. 21 of the Bankruptcy Act, 1883 (1), of their

(1) By the Bankruptcy Act, 1883, s. 21, "(1.) The creditors may by ordinary resolution appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt. (2.) The person so appointed shall give security in manner prescribed to the satisfaction of the Board of Trade, and the Board, if satisfied with the security, shall certify

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objection to the appointment of J. Gregson as trustee of the property of G. Lamb, a bankrupt.

On December 21, 1893, a receiving order was made against one J. Emerson, in the county court at Kingston-upon-Hull; adjudication followed, and on January 24, 1894, at the first meeting of the creditors, J. Gregson was appointed the trustee in the bankruptcy, with a committee of inspection.

On January 2, 1894, a receiving order was made against G. Lamb in the same county court; adjudication followed; and on January 31, at the first meeting of the creditors, J. Gregson was appointed the trustee in the bankruptcy, with a committee of inspection.

J. Gregson was a creditor of Emerson's estate for about 3000*l.*, which was partly secured; and he was also an unsecured creditor of Lamb's estate for about 400*l.* Practically the only asset which either bankrupt had was his interest in the equity of redemption of a large tract of waste land known as the Maplin Sands. One-third of this property was vested in a Colonel Moffat. The remaining two-thirds were vested in Lamb; but Emerson alleged that one of those two-thirds was held by Lamb in trust for him.

The Board of Trade confirmed Gregson's appointment as trustee of Emerson's estate, but they objected to his appointment as trustee of Lamb's estate, under sub-s. 2 of s. 21 of the Bankruptcy Act, 1883, on the ground that his connection with or relation to the bankrupt and his estate made it difficult for him to act with impartiality in the interests of the creditors generally; and, at the request of the majority in value of the creditors of Lamb's estate, the Board notified their objection to the High Court.

The evidence shewed that the liabilities of each estate were

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that his appointment has been duly made, unless they object to the appointment on the ground that . . . the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally. (3.) Provided that where the Board make any such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity."

heavy, and that the Maplin Sands estate was an asset of very doubtful value. If realized with advantage, all the creditors of both estates would be paid in full; but if a forced sale by the mortgagees took place, very little, if any, dividend would be realized for the unsecured creditors. The only possible purchaser was the War Office, who had already bought a portion of the property, and everything depended on negotiations with them being skilfully conducted. The creditors of both estates had been consulted on the objection of the Board of Trade, and had expressed, almost unanimously, their desire that there should be unity of interest in realizing the Maplin Sands, and that all questions between the two estates should be left for subsequent adjustment. They also desired that Mr. Gregson should be the trustee of both estates. It further appeared that Mr. Gregson's appointment as trustee of both estates was acceptable to Colonel Moffat, and also to all the various mortgagees.

Sir J. Rigby, A.-G., and *Muir Mackenzie*, for the Board of Trade. As a general rule, the same person ought not to be appointed trustee of two estates between which conflicting interests may arise. In the present case it is also a grave objection that Mr. Gregson has personal interests in both estates which are necessarily conflicting. He is a large creditor of Emerson's estate and a small creditor of Lamb's estate, and he will lose the whole of his large debt unless he establishes Emerson's claim against Lamb's estate for one-third of the Maplin Sands. His personal interest, therefore, necessarily conflicts with his duty as trustee of Lamb's estate, it will be very difficult for him to act with an unbiassed mind; and his position as trustee will enable him to exercise considerable influence.

H. Reed, Q.C., and *Carrington*, for the creditors. If the objection of the Board of Trade is to prevail, it will prevent a creditor being appointed a trustee under any circumstances. If another person is appointed trustee of Lamb's estate, it will probably lead to litigation between the two estates, which it is most desirable to avoid. The great majority of the creditors of both estates desire that there should be but one trustee of the two estates, and that Mr. Gregson should be that trustee. They look

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at the matter from a business point of view, and consider that there should be unity of interest in realizing the Maplin Sands, and that all questions between the two estates should be adjusted afterwards. Under the circumstances the Court is asked to give effect to the wishes of the creditors.

Muir Mackenzie, in reply, cited *In re Martin.* (1)

VAUGHAN WILLIAMS, J. Generally speaking, having regard to the difficulty with which the Board of Trade has to exercise its discretion with respect to the supervision of the choice by creditors of a trustee, the Court ought to support the Board of Trade if their objection is one which can be reasonably supported. In the present case, I am not at all prepared to say that the objection cannot be reasonably supported, because there can be no doubt that in point of form Mr. Gregson has an interest, as a creditor of Emerson's estate, which might conflict with his duty as trustee of Lamb's estate when having to consider whether Emerson's estate has a valid claim to a large part of the assets of Lamb's estate. I could not in the face of that say that the discretion which has been exercised here by the Board of Trade is unreasonable. But despite of that, and of the general rule that I have just laid down, I think that in the present case I ought not to support the objection of the Board of Trade. Now, their objection is really two-fold. First, it is said that nobody ought to be trustee of two estates between which conflicting questions may arise. If the proposition is put in that way, I think it goes too far. The Bankruptcy Act and the whole bankruptcy practice recognise that that is not so. Every time that there is a joint adjudication against partners, and a separate distribution therefore of the joint estate and of the separate estate of the partners, it is almost certain that questions will arise between the two estates—between the joint creditors and the separate creditors—and I have never heard any one suggest that the trustee was not competent to deal with those questions. I do not say that it never might be a good objection that questions were likely to arise between the two estates. But in this particular case one must bear in mind the nature of the

(1) 21 Q. B. D. 29.

questions which are likely to arise between these two estates. Practically, it is a question of title only, and of such a character that the personal influence or the personal interference of the trustee can hardly have any bearing whatever upon the result. Then, what is the other objection? It is that, not only have the creditors here appointed the same trustee to represent estates which possibly have conflicting interests, but that the gentleman who has been selected has a very much larger interest in the success of one estate than he has in the success of the other. Here again, I say, one must bear in mind the nature of the question. That being so, let me consider what there is to be said on the other side. In the first place, there is the almost unanimous and strong expression of opinion by the creditors of both estates. Here are two estates that have got conflicting interests, and the creditors of both estates say, "Having regard to the nature of this property in which we both are interested, we think it to be of paramount importance that we should have one gentleman to represent us both." I am not quite sure whether they say, "We have a common enemy in the War Office, and it is desirable that we should be united"; but they do say, "Our property is of such a nature that it is of the first importance to us that there should be unity in the realization of it, and we will postpone any question of adjustment of rights until after we have by our unity given solidity and value to the property in which we have a common interest." That is the first thing I have to take into consideration. In the next place, it does seem to me that there is great force in the observation that this is a very peculiar estate. It is a large tract of waste ground, and if it has any value it may be a very large value; but that value is entirely dependent upon the successful conduct of negotiations between those who are interested in the property as creditors of the two bankrupts and the only possible purchaser, the War Office. It is said that these negotiations cannot be carried on successfully unless they are carried on with the concurrence and approval of the mortgagees, and the creditors obviously think that Mr. Gregson's position is one that will make him a persona grata to all who are interested in the two estates—whether the creditors of Lamb, or the creditors of

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Emerson, or the mortgagees. I think, having regard to the peculiar nature of the property, that it is of the utmost importance there should be unity of representation. I am quite sure that if I had been a creditor of either estate, and had had the whole of the facts brought before me which have now been brought before me, I should have done the same as the majority of creditors have done. I do not think I ought to leave out of consideration the nature of the question in respect of which it is said that a conflict of interest might arise in the breast of Mr. Gregson; but it is really a question upon which, as I have pointed out, he could exercise very little influence, even if he wished it. On the whole, taking all matters into consideration, I think that, notwithstanding the general rule with which I commenced this judgment, I ought not to uphold the objection of the Board of Trade. I hold, therefore, that the objection is invalid.

H. L. F.

An order was drawn up declaring that the objection of the Board of Trade to the appointment of Gregson as trustee in the bankruptcy of Lamb was invalid.

The Board of Trade appealed.

July 6. *Sir J. Rigby, A.-G.*, and *Muir Mackenzie*, for the Board.

H. Reed, Q.C., and *Carrington*, for the creditors, took the preliminary objection that no appeal lay from the decision of the judge in such a case.

Sir J. Rigby, A.-G., and *Muir Mackenzie*, for the Board of Trade. This decision is a decision of the High Court, and it is an "order in bankruptcy" within the meaning of s. 104 (1) of the Bankruptcy Act, 1883, and is therefore subject to appeal "at the instance of any person aggrieved." The Board of Trade are "persons aggrieved," because the decision has gone against them: *Ex parte Official Receiver.* (2)

(1) By s. 104: "(2.) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows" (inter alia). "(b) An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal."

(2) 19 Q. B. D. 174.

Herbert Reed, Q.C., and *Carrington*, for the majority of the creditors. First, in exercising its jurisdiction under s. 21, sub-s. 3, to decide on the validity of an objection taken by the Board of Trade to the appointment of a trustee, the High Court is not determining a litigation between parties; it is only put in the place of the Board to decide upon the validity of the objection. The decision is in no sense a judgment or order of the Court. It is not even clear that anything in the nature of an order should be drawn up. In some instances in the Bankruptcy Rules, 1886, a right of appeal is expressly reserved to the Board of Trade, e.g., in rules 202 and 237. Such a rule is intrà vires: *In re Stainton.* (1) In rule 299 (2), which deals with the present matter, no such right is reserved.

Second, at any rate the Board of Trade are not "aggrieved" by the decision. They were not asking for anything from the Court in the character of litigants. They only wanted the decision of the Court as to the validity of their objection.

LORD ESHER, M.R. It seems to me perfectly clear that the learned judge gave a decision in the nature of a judgment, and that there was an order made by him. Whenever there is a dispute between parties which is carried before a judge in his judicial capacity, and which he has to decide, his decision is a determination after hearing, and is equivalent to a judgment. Upon that the judge is bound to make some order, either refusing or granting the application. Therefore, this order is an "order" within the meaning of that word as used in the Act

(1) 19 Q. B. D. 182.

(2) Rule 299: "(1.) Where the Board of Trade objects to the appointment of a trustee, and is required by a majority in value of the creditors to notify the objection to the High Court, the requisition shall be in the Form No. 114 in the Appendix, with such variations as circumstances may require. On receipt of such requisition, the Board of Trade shall forthwith transmit a copy thereof to the senior bankruptcy registrar of the High Court, who shall fix a time for the hearing of the matter. At the hearing the person objected to, and every creditor and the Board of Trade, shall be entitled to be heard. (2.) The Board of Trade may also with the copy of the requisition communicate to the Court the grounds of its objections. Any report so made by the Board of Trade shall be primâ facie evidence of the statements therein contained."

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and the Rules, and it is an order in a bankruptcy matter. From every order in a bankruptcy matter there is by the express terms of s. 104 an appeal to this Court.

Then it is said that this appeal is brought by the wrong person, that the Board of Trade are not "aggrieved" by the order. There cannot be any other appellant, and, therefore, if that objection is good, there can be no appeal, although, as I have just shewn, there is a right of appeal. The meaning of the term "person aggrieved" was explained by this Court in *Ex parte Official Receiver.* (1) It was there determined that any person who makes an application to a Court for a decision, or any person who is brought before a Court to submit to a decision, is, if the decision goes against him, thereby a "person aggrieved" by that decision.

Here the creditors summoned the Board of Trade before the judge to support the validity of their objection, and the Board went before the judge. The Board and the creditors were heard, and the judge had to give his determination. That determination being against the Board upon the matter which was brought before the Court, they are "aggrieved" by it, if it is wrong. They are, therefore, persons aggrieved, and are entitled to appeal to this Court. I think there is no foundation for this preliminary objection.

KAY, L.J. I am of the same opinion. [The Lord Justice referred to s. 21, and to rule 299 of the Bankruptcy Rules, 1886, and Form No. 114 in the Appendix, and continued:—]

It is plain that when such an objection is notified to the judge of the High Court he is bound, under rule 299, to give a hearing to the proposed trustee, to every creditor who wishes to be heard and whom the judge thinks it right to hear, and to the Board of Trade. The Board of Trade is in the position of a litigant before the judge, for the purpose of determining whether the objection which they have made is or is not a valid objection, and this is what was actually done here. This case came on for hearing before the judge of the High Court, and he made this (I will not at present call it an "order"), but he made this

(1) 19 Q. B. D. 174.

declaration, "that the said objection is invalid, and it is further ordered that the costs of the creditors of the notification and hearing be taxed and paid out of the estate of the bankrupt." Then s. 104 authorizes an appeal by any "person aggrieved" by any order in bankruptcy. The preliminary objection to the appeal is two-fold: (1.) It is said that the Board of Trade are not "persons aggrieved." They are persons whom the Court was bound to hear, if they wished to be heard, on the validity of this objection, and the decision has been against them. How it can be said that they are not "persons aggrieved," by the decision, passes my understanding. When two persons are in the position of litigants before the High Court, and the decision of the Court goes against one of them, how it can be said that he is not a "person aggrieved," by the decision, I cannot understand. I am clearly of opinion that the Board were "persons aggrieved" by this decision. Then (2.) it is said that the decision is not an "order." When the High Court makes a declaration of right, and further orders the costs of the application to be paid (which is the common form here used), and that is drawn up and sealed with the seal of the Court, and, I suppose placed on record, as all orders of the High Court are, it seems to me that it is clearly an order of the Court.

Take the instance, which I put during the argument, of an originating summons to have a question on the construction of a particular document determined, and upon that the Court declares the construction. That declaration is not, strictly speaking, a "judgment," because it is not made in an action; but is it not an "order"? If it were not, I presume there would be a difficulty in appealing from it, because, under the Rules of the Supreme Court, an appeal lies only from a "judgment or order." But such a declaration has in practice always been treated as an appealable order. I have no doubt that this objection fails equally with the other, or that this decision was an order of the High Court in a bankruptcy matter which, by the very terms of s. 104, is made appealable.

A. L. Smith, L.J. The first question is, whether this decision or determination of my brother Vaughan Williams was an "order."

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It was made in a matter which he, who was the High Court, had to hear and to determine. He had to determine the matter which was brought before him, having before him the parties who were entitled to be heard on the matters in dispute. He had to hear and determine the matter, and in my judgment he made an "order." There is, therefore, an appeal to this Court from the order which he made.

Now comes the second question. By whom can that appeal be made? It can be made by any "person aggrieved" by the order. I have no doubt that the decision in *Ex parte Official Receiver* (1) applies, and I agree with the majority of the Court in that case. It follows the Board of Trade are "persons aggrieved," and are entitled to appeal.

Objection overruled.

The appeal was then heard on its merits.

Sir J. Rigby, A.-G., and *Muir Mackenzie*, for the Board of Trade.

Herbert Reed, Q.C., and *Carrington*, for the majority of the creditors.

Haldinstein, for a creditor who supported the objection of the Board of Trade.

The arguments were in substance the same as those adduced in the Court below.

LORD ESHER, M.R. Notwithstanding the great experience of the learned judge and the high appreciation which we all have of his knowledge of bankruptcy, I am compelled to differ from him, and I differ from him on this ground, that he has taken into consideration the wrong question, or, to use the words of my learned brother Smith, he has put the wrong question to himself. He seems to have considered only this question, Would it be better in the interest of the creditors that there should be one trustee of both estates for the purpose of realizing a particular asset? In my opinion, the question which he ought to have put is this: If the same person is appointed trustee of Lamb's estate who has already been appointed trustee of Emerson's estate, will

(1) 19 Q. B. D. 174.

he be brought in the course of the administration of Lamb's estate into a state of circumstances which will make it difficult for him to act with impartiality in the interests of the creditors generally of Lamb's estate? That question the learned judge does not seem to have considered at all. The Board of Trade objected to confirm the appointment of Mr. Gregson as the trustee of Lamb's estate, their reason being that, if he is appointed trustee of Lamb's estate, when he comes to distribute that estate and Emerson's estate he will be placed in a position in which it will be difficult for him to act with impartiality in the interests of Lamb's creditors generally. I do not deny that, when the Board of Trade have made their objection, and creditors are dissatisfied with it and with the grounds of it, they have a right to take the objection before the judge of the High Court acting in bankruptcy, and to dispute whether the objection is a valid objection, and, for the purpose of determining that question, the judge must go into the facts which are pertinent, and he must determine those facts according to the evidence which is before him. But when he has decided there is, as we have already held, an appeal from his decision to this Court. What kind of appeal is it? The appeal is from a judge sitting without a jury, and, therefore, this Court has a right to differ from him upon his estimate of the facts. Moreover, if they adopt his estimate of the facts, they must then consider whether they agree with his decision in point of law. In coming to a decision we must have regard to the question which has to be decided. That question is, Whether the objection of the Board is a valid objection, it being that Mr. Gregson's connection with or relation to the bankrupt and his estate makes it difficult for him to act with impartiality in the interests of the creditors generally. The question is not, Would he or would he not, in fact, act with impartiality? One may have a strong belief that he would, if he is a gentleman of high character, act with impartiality, notwithstanding the difficulty in doing so. But the question is, treating him as an ordinary man, whether it would be "difficult for him to act with impartiality"?

What are the facts proved? Gregson is the trustee of Emerson's estate. Emerson's estate is, or claims to be, a creditor

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of Lamb's estate. Gregson, as the trustee of Emerson's estate, i.e., for the creditors of Emerson's estate, ought to push their claim against Lamb's estate. But, if he is made trustee of Lamb's estate then he ought, on behalf of the creditors of Lamb's estate, to resist, so far as it is fair and reasonable to resist, any claim by Emerson's estate against the estate of Lamb. That being his position, he is moreover himself a creditor, or claims to be a creditor, of Emerson's estate to the extent of 3000*l.* He is, or claims to be, a creditor of Lamb's estate, but only to an amount of something less than 400*l.* Therefore he is in this position, that, if he but faintly resists on behalf of Lamb's creditors the claim of Emerson's estate, that estate will succeed in establishing the claim against Lamb's estate, and if anything is realized he will be a creditor for 3000*l.* on Emerson's estate, but if he succeeds on behalf of Lamb's creditors in resisting the claim of Emerson's estate, then he will only be a creditor of Lamb's estate to the extent of 400*l.* I quite agree with Mr. Reed that the Court ought to consider the question as a business matter. But how is that to be done? You must take a man of ordinary good and right feeling and honesty, and ask yourself, will it not be difficult for such a man, however conscientious he may be, to act under such circumstances so much against his own interest as to do all that he can for Lamb's creditors against Emerson's creditors, of whom he is one? Looking at it as a matter of business in such circumstances in the case of a man of ordinary honesty and ordinary care, I must say that it would be difficult for him to act impartially in the interests of Lamb's creditors, that is, he would be not unnaturally led to a partiality in favour of Emerson's estate which claims to be a creditor of Lamb's estate.

Then Mr. Reed says that, though this difficulty may arise, it will only arise at a later stage. It will only arise after the asset of the Maplin Sands has been realized, and he says that for the purpose of realizing that asset it would be for the advantage of all those who are interested in the realization that there should be only one trustee to deal with the realization. I will assume that that would be so. But, when that asset has been realized, before these two estates can be wound up and distributed among the different creditors, the other question must arise. Therefore it

comes to this. A question must arise which will place Mr. Gregson in this difficulty, but it will not arise at first. It will only arise later. Looking at the judgment of the learned judge I cannot help thinking that that is the view which he has taken, and, in my opinion, it is a wrong view, and I cannot agree with it. It seems to me obvious, in the most business-like view which I can take of the matter, that, in the distribution of Lamb's estate after the assets have been realized, Mr. Gregson, if he were allowed to remain trustee of both estates, would be placed in a position in which it would be difficult for him to act with impartiality, although one might expect from a person of his character that he would, in fact, notwithstanding the difficulty, act impartially. But that is not the question before us. The question is, whether it would place him in such a position of difficulty, and, if so, the objection taken by the Board of Trade is a valid objection, and ought to be maintained. I must differ from the decision of the learned judge, and I think that the appeal should be allowed.

KAY, L.J. I wish I could believe that the creditors of a bankrupt were the best persons to decide all questions which arise in reference to his estate, but I am afraid the history of the bankruptcy law shews exactly the contrary. It seems to me that s. 21 is really a recognition of the fact that the creditors are not always the best persons to have the ultimate decision of any questions concerning the bankrupt's estate.

[The Lord Justice read s. 21, and continued:—]

This appeal is from a decision of Vaughan Williams, J., who has held that the objection raised by the Board of Trade is invalid. What are the facts? Mr. Gregson, whom Lamb's creditors have appointed to be trustee of his estate, was at the time of that appointment trustee of Emerson's estate. The only asset of either estate, as we are told, is an interest in the Maplin Sands, and in a sum of money which the War Office have paid for the purchase of some 6000 acres of those sands. The interests are very heavily mortgaged, and there is a question between the two estates, Emerson claiming one half of Lamb's interest in the land and in the money. Gregson is a creditor of Emerson's estate for about 3000*l.*, and he is a creditor of

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Lamb's estate for about 400*l.* The question between Lamb's estate and Emerson's estate is at present unsettled, but, if there be any assets to divide between the two estates, it must at some time or other be decided, and it must then be decided between the trustees of the two estates as litigants. If the same person is trustee of both estates he will have to occupy the positions of both plaintiff and defendant in that litigation, in whatever way it comes to be decided. One cannot, therefore, but see that the objection of the Board of Trade to the appointment of Gregson comes within the latter part of sub-s. 2 of s. 21, and that it would be difficult for him to act impartially in the interests of the creditors of Lamb's estate. The learned judge in the earlier part of his judgment appears to me to have recognised the difficulty frankly, and to have stated it in the very words which, if I had been counsel for the Board of Trade, I should have put it by way of argument. He admits that in point of form Gregson's interest as a creditor of Emerson's estate might conflict with his duty as trustee of Lamb's estate. That is really an admission that the objection made by the Board of Trade to the appointment of Gregson as trustee of Lamb's estate was a valid objection under the power given to them by s. 21 of the Act. Then the learned judge goes on to say, as I understand him, that he cannot lay down, as a general rule, that, in all cases in which there are conflicting interests, the same man cannot be trustee of two estates, and he instances the well-known and constantly occurring case in which a trustee of the joint estate of a firm is also trustee of the separate estates of the several partners. The learned judge was not, however, called upon to lay down any general rule, and I am far from wishing to do so myself. I do not say that, in every possible case in which there is a conflict of interest between two estates, the trustee of the one estate ought not to be the trustee of the other. But we have to deal with this particular case, and in it I do say there is such a conflict of interest as would place Mr. Gregson in a most unfortunate position if he should be the trustee of both these estates, a position in which I do not hesitate to say no person ought to desire to be placed. I should think Mr. Gregson would himself feel the difficulty so strongly that he

would be glad to be removed from the office of trustee of one or other of these estates. Therefore I agree entirely with the earlier part of the judgment of the learned judge, but how, after stating the difficulty as he did, he could have arrived at the conclusion that Mr. Gregson ought to remain trustee of Lamb's estate, or that the objection of the Board of Trade was invalid, I confess I am unable to understand. He seems to me to have begun by saying that the objection was a valid one, and then to have said that there were reasons which nevertheless induced him to think that Mr. Gregson ought to be confirmed as trustee of Lamb's estate. That was not the question before the learned judge. The only question before him was this, Is the objection of the Board of Trade valid or not? I agree with him that the objection was a valid objection, but I think that, having come to that conclusion, it was not within his jurisdiction on other grounds to overrule the objection.

The argument has been put in this way, and I presume it is this argument which impressed the learned judge, though I cannot find it distinctly stated in his judgment. Mr. Reed said, the first thing which the trustee will have to do will be to realize the Maplin estate. If it cannot be realized, or if it should realize very little, there will not be enough to pay off the incumbrances, and there will be nothing left for either estate. Mr. Gregson is thought by the creditors to be the best person to realize the property. To use the language of the learned judge, Mr. Gregson will be "persona grata to all who are interested in the two estates"—I am not sure whether he means the War Office or the creditors—and that, therefore, he is the best person to realize the property, and that if there were two different trustees there might be more difficulty in realizing, for they might have adverse views as to what ought to be done. But surely, if there are two trustees, each of whom is interested in making the best of his own estate, there cannot be much doubt that they will concur in getting the best price they can get for the property from anybody. I do not apprehend that in practice any difficulty of that kind need arise. That has been the main ground of Mr. Reed's argument against the objection, and it really comes to this—admitting that the objection of the Board of Trade is a valid

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objection, still it should not prevail at present, because the first thing to do is to realize the property, and while it is being realized the objection will not arise at all. It is only after the property has been realized that the objection will arise. I am not indeed myself quite clear that the objection may not arise, and may not to some degree affect the price to be obtained for the property, if Mr. Gregson is the only person to realize it.

However, I think that the objection of the Board of Trade is a perfectly valid one in this particular case; that is really what we have to decide, and no consideration has been presented to us which induces me to think that we ought not to allow the validity of the objection. Therefore, with great deference, I dissent from the decision of the learned judge, and think it should be reversed.

A. L. SMITH, L.J. The point to be decided is, whether the appointment of Mr. Gregson as trustee of Lamb's estate is a valid appointment or not. This depends, as it appears to me, upon this—Was Gregson's connection with Emerson's estate such as to make it difficult for him to act with impartiality in the interests of the creditors of Lamb's estate? If it is shewn that Gregson stands in such a position to Emerson's estate, then his appointment as trustee of Lamb's estate is invalid.

Now, what is the salient point in this case? If a man has a pecuniary interest in the success of one estate which is the creditor of another estate, and he has no pecuniary interest in the success of the other estate, and he is called upon to act for both, it seems to me that a primâ facie case is made out that he is placed in a difficulty as regards acting with impartiality between the two. It is obvious—everybody knows it who has any knowledge of life—that when a man has a pecuniary interest, his mind is naturally warped in favour of his own interest. It is human nature, and no one can doubt it. Beyond all question Mr. Gregson has a pecuniary interest as a creditor to the amount of 3000*l.* in the success of Emerson's estate. As regards Lamb's estate he as a creditor has a pecuniary interest of only 400*l.*, and it is said that Emerson's estate is a creditor of Lamb's estate. Standing in this position between the two estates, can it be said with

truth that Mr. Gregson's connection with Emerson's estate is not such as to make it difficult for him to act with impartiality towards Lamb's creditors? This is the real question, and that question my brother Vaughan Williams did not put to himself. If he had done so, I think he would have answered it in the same way as I am now doing. We are not suggesting that Mr. Gregson is not a gentleman of probity—not a word has been said about that—but the question is, whether upon the facts of the case the objection of the Board of Trade to his appointment as trustee of Lamb's estate was a valid objection. In my judgment it was.

Appeal allowed.

Solicitors: *Solicitor to Board of Trade; W. Rawlins; Lindo & Co.*

W. L. C.

HUFFAM, APPELLANT *v.* THE NORTH STAFFORDSHIRE RAILWAY COMPANY, RESPONDENTS.

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Railway—Bye-laws—Validity—Penalty—Using Ticket not available—Absence of Fraud—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 103, 104, 108, 109—*Regulation of Railways Act,* 1889 (52 & 53 *Vict. c.* 57), *s.* 5, *sub-s.* 3 (*a*)—*Statute Law Revision Act,* 1892 (55 & 56 *Vict. c.* 19).

The appellant was convicted of travelling on the respondents' railway with a ticket not available for the day on which he used it, under a bye-law which subjected to a penalty "Any passenger using or attempting to use a ticket on any day for which such ticket is not available." He was not guilty of fraud, and had no intention to commit fraud:—

Held, that, in the absence of fraud, the appellant was not liable to be convicted, that the bye-law was invalid, and the conviction must be set aside.

CASE stated by justices.

The appellant was charged on an information preferred by the respondents, for that he, on March 15, 1894, at Stoke-upon-Trent, did unlawfully use a certain railway ticket on a day for which such ticket was not available, contrary to the bye-laws of the company.

The proceedings were taken under bye-law No. 2 of the respondents' bye-laws, made in pursuance of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and duly allowed and published, and which was in the following words:—

"Any passenger using or attempting to use a ticket on any

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day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding 40 shillings."

A duly certified copy of the respondents' bye-laws was put in evidence, and proof was given of the due publication of such bye-laws as required by 8 & 9 Vict. c. 20, s. 110.

The appellant travelled on the respondents' railway by the train which departed at 5.30 P.M. on Thursday, March 15, 1894, from Stoke-upon-Trent to Macclesfield.

The tickets of the passengers by that train were examined at Congleton, an intermediate station between Stoke-upon-Trent and Macclesfield, and the appellant there tendered the return half of a first-class return ticket, which bore the date of February 28, 1894, as the date of issue, and which had been purchased by him on February 28, 1894.

The following is a copy of the ticket tendered by the appellant, and of the conditions indorsed:—

Number of ticket.

"Issued by the N. S. R. Co. subject to the Company's regulations and to the conditions in their time-tables. Not transferable. First Class. Available on the day of issue for one journey only. Stoke-on-Trent to Macclesfield H. R. Fare 5/9 viâ main line."

There was nothing on the back of the ticket except the date of issue.

One of the regulations and conditions contained in the respondents' time-tables at the date of the issue of the ticket was as follows:—

"Return tickets between North Staffordshire railway stations are available for the day of issue only, except those issued on Saturday or Sunday, which are available up to the Monday evening following. Return tickets issued between North Staffordshire stations and Derby, Burton, Crewe, Stafford, or Market Drayton, are available for seven days."

The full first-class fare from Stoke-upon-Trent to Macclesfield was demanded from the appellant by the respondents' ticket-examiner at Congleton, but the amount was not specified. The appellant refused to pay such fare, but gave his correct name and address. The appellant had a first-class annual contract

ticket by which he was entitled to travel between Macclesfield and Manchester on the line of the London and North Western Railway Company on March 15, 1894.

The respondents' solicitor contended that, though the respondents did not allege or suggest that the appellant intended to commit any fraud, or was actuated by fraudulent motives, nevertheless the bye-law was valid and binding on all persons using their railway, and that, to obtain a conviction thereunder, it was not necessary to shew that either a fraud had been committed, or had been attempted to be committed, upon the company by the person using a ticket on a day other than that for which it was marked available.

The appellant's solicitor contended that, though he admitted that the ticket had been purchased on February 28, 1894, the justices had no power to convict the appellant. He contended that the bye-law was ultrà vires on the ground that by it an offence was constituted without any allegation of fraud or intent to defraud, and in this case no fraud or intent to defraud was alleged against the appellant.

The justices were of opinion that the bye-law applied, and was not ultrà vires. They therefore convicted the appellant of an offence against the bye-law, and adjudged him to forfeit and pay a sum of 20*s.* and costs.

The question of law for the opinion of the Court was,

Is the bye-law valid, and ought it on the facts stated to have been enforced by the justices against the appellant?

A. T. Lawrence, for the appellant. It is clear on the facts stated in the case that there was nothing in the nature of fraud or mala fides on the part of the appellant, and, that being so, the case does not come within any of the statutory provisions giving power to make bye-laws imposing penalties for travelling without having paid a fare. (1) All those clauses when imposing a penalty treat the existence of an intent to defraud as a condition precedent to liability, and the railway company have no

(1) By the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 103, a penalty of 40*s.* was imposed for travelling on a railway without having paid a fare, "and with intent to avoid payment thereof." (This

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right to eliminate that element, which is what they seek to do in the present case, by making a bye-law, the effect of which is to convert a bonâ fide mistake into an offence subject to a penalty. The result is that the bye-law under which the appellant has been convicted is invalid, and the conviction is bad. The point is covered by authority. The decision of Lindley and Mathew, JJ., in *Dyson* v. *London and North Western Ry. Co.* (1), is conclusive in favour of the appellant's contention, and the opinion expressed by Brett, L.J., in *London and Brighton Ry. Co.* v. *Watson* (2) is to the same effect.

Craies, for the respondents. The bye-law is valid, and the appellant was properly convicted. *Dyson* v. *London and North Western Ry. Co.* (1) has no application to the present case, for the decision there turned on the first part of s. 103 of the Railways Clauses Consolidation Act, 1845, and that clause has since been repealed by the Statute Law Revision Act, 1892. The dictum of Brett, L.J., in *London and Brighton Ry. Co.* v. *Watson* (2) was unnecessary for the decision of the case, and Bramwell and Cotton, L.JJ., expressly abstained from giving any opinion on the point.

[He also referred to *Saunders* v. *South Eastern Ry. Co.* (3)]

A. T. Lawrence, was not heard in reply.

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part of the section is now repealed by the Statute Law Revision Act, 1892 (55 & 56 Vict. c. 19).

By s. 104 power is given to apprehend and detain offenders.

By s. 108: "It shall be lawful for the company, from time to time, subject to the provisions and restrictions in this and the special Act contained, to make regulations for the following purposes; (that is to say) . . . generally, for regulating the travelling upon, and using or working of, the railway. . . ."

By s. 109: "For better enforcing the observance of all or any of such regulations it shall be lawful for the company, subject to the provisions of" 3 & 4 Vict. c. 97 (under which bye-laws require the sanction of the Board of Trade) "to make bye-laws . . . provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act;" and power is given to the company to impose penalties on persons offending against such bye-laws.

By the Regulation of Railways Act, 1889 (52 & 53 Vict. c. 57), s. 5, sub-s. 3: "If any person (*a*) Travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof; . . . he shall be liable on summary conviction to a fine not exceeding 40 shillings. . . ."

(1) 7 Q. B. D. 32.

(2) 4 C. P. D. 118, at p. 120.

(3) 5 Q. B. D. 456.

MATHEW, J. I am of opinion that the conviction was wrong. The defendant was innocent of any attempt to defraud, and of anything in the nature of dishonesty or mala fides; but it is considered convenient for the railway company to press this bye-law against him, because such bye-laws as this, in other cases, may be used with effect against persons who are fraudulent. I am of opinion that this bye-law is clearly bad. That it would be bad under the sections of the Railways Clauses Consolidation Act, 1845, which have been referred to in argument, is shewn by the decision in *Dyson* v. *London and North Western Ry. Co.* (1) It is contended on behalf of the respondents that the bye-law has been set up and rendered valid by the repeal of the first part of s. 103 of the Railways Clauses Consolidation Act, 1845, by the Statute Law Revision Act, 1892; but the answer to that contention is that before the Statute Law Revision Act, 1892, came the Regulation of Railways Act, 1889, which provides an elaborate code with reference to offences of this description. A passenger cannot be convicted in a case of this kind unless the case is brought within s. 5, sub-s. 3 (*a*), by which a penalty is imposed on any person who "travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof." In the present case it is true that the passenger was travelling on the railway without having previously paid his fare; but it is also the fact that he was travelling without any intent to avoid payment. The conviction must be set aside.

KENNEDY, J., concurred.

Judgment for the appellant.

Solicitors for appellant: *Purkis & Co., for Sword & Son, Hanley.*

Solicitors for respondents: *Chester & Co., for Paine, Hanley.*

(1) 7 Q. B. D. 32.

P. B. H.

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Aug. 3.

THE LONDON COUNTY COUNCIL, APPELLANTS *v.* WORLEY, RESPONDENT.

Metropolis—Management Acts—Height of Buildings—Building erected on Side of New Street—Continuance at prohibited Height after Notice—Continuing Offence—Complaint made within six Months after Commission or Discovery of Offence—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 85, 107.

Sect. 85 of the Metropolis Management Amendment Act, 1862, prohibits the erection of a building on the side of a new street of a less width than fifty feet, which shall exceed in height the distance from the front of the building to the opposite side of the street, without the consent of the London County Council, and imposes penalties for offences against the Act, and, in case of a continuing offence, a further penalty for every day during which such offence shall continue after notice from the County Council.

By s. 107, no person is liable to a penalty unless the complaint has been made within six months next after the commission or discovery of such offence.

The respondent was owner of a building of a height prohibited by s. 85. No proceedings were taken against him in respect of the erection of the building. More than six months after the completion of the building the London County Council served a notice, requiring him to comply with the law with respect to the building, subject to the penalties provided by s. 85, and afterwards summoned him for penalties of 40*s.* for each day after the date of the notice:—

Held, that the continuance at a prohibited height, after notice, of a building already erected was a continuing offence within the meaning of the Act, that complaint had been made within six months next after the commission or discovery of the offence, and that the respondent was liable.

CASE stated by a metropolitan police magistrate.

On March 7, 1894, the appellants summoned the respondent, for that he, on December 31, 1893, and on each of the then succeeding days, up to and including March 7, 1894, at Kensington Court, having committed an offence under the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 85, by unlawfully erecting a building on the south side of Kensington Court, being a new street of a less width than fifty feet, exceeding in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the London County Council, unlawfully did continue the said offence, by continuing the building so erected, and by permitting and suffering the

said building to continue erected, above the said height, without such consent as aforesaid, after notice from the London County Council, contrary to 25 & 26 Vict. c. 102, s. 85, and 51 & 52 Vict. c. 41.

On the hearing it was proved or admitted that the building had been erected for the respondent as owner, and under his directions, and had been carried above the height specified in 25 & 26 Vict. c. 102, s. 85, under his directions, and after notice from the appellants to the builders, Messrs. Lawrance & Sons, that proceedings would be taken if such height were exceeded, which notice was brought by them to the knowledge of the respondent, and the respondent thereupon communicated with the appellants by letter, and informed them that he was the owner of the building, and that the builders, Messrs. Lawrance & Sons, were employed by him to erect it, that the builders had given up possession of the building on February 8, 1893, and that the respondent on the dates in the summons mentioned was and still continued in possession of the building as owner. It was also admitted that the building still remained as so erected above the specified height.

On September 7, 1893, the respondent applied to the appellants to give their consent nunc pro tunc to the erection of the building beyond the height specified in the statute; and on October 16, 1893, the appellants refused to give such consent, and gave notice thereof to the respondent.

It was also proved or admitted that a penal notice had been served on the respondent by the appellants on December 23, 1893, requiring him to comply with the requirements of the law with respect to the building, subject to the penalty and continuing penalties in 25 & 26 Vict. c. 102, s. 85, provided, and that a similar notice had been served on the builders on October 7, 1892, which had been brought immediately to the notice of the respondent.

It was contended for the respondent that he was not liable to any penalty for the continuing offence, as he had not been summoned for or convicted of the original offence, and that he was not liable to the penalty for the original offence because proceedings had not been taken against him within six months

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of the commission or discovery of such offence, and, in support of this contention, 25 & 26 Vict. c. 102, s. 107, and 11 & 12 Vict. c. 43, s. 11, were referred to.

It was contended for the appellants that the limitation of time within which proceedings could be taken did not apply in the case of a continuing offence, that the respondent had, in fact, committed the original offence, and that he was liable to the continuing penalties for continuing the offence after the penal notice served on him on December 23, 1893.

The magistrate held that 25 & 26 Vict. c. 102, s. 107, and 11 & 12 Vict. c. 43, s. 11, applied, and that the summons was out of time, and dismissed the same.

The question for the opinion of the Court was whether his determination was right in point of law.

Poland, Q.C. (*Avory*, with him), for the appellants. The respondent is shewn to have been guilty of a "continuing offence" within the meaning of s. 85 of the Metropolis Management Amendment Act, 1862 (1), for after he had received from the appellants the written notice of December 23, 1893, he continued the building at the prohibited height, and is therefore liable to a penalty of 40*s.* for every day after the notice down to the date of the summons. The six months' limitation imposed by s. 107 does not affect the case, for the continuing offence in question does not arise until notice is given, and therefore the complaint

(1) 25 & 26 Vict. c. 102:—

By s. 85: "No building, except a church or chapel, shall be erected on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the Metropolitan Board of Works" (now, by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 40, sub-s. 8, the London County Council); . . . "and every person committing any offence under this enactment shall be liable to a penalty of 5*l.*, and in case of a continuing offence to a further penalty of 40*s.* for every day during which such offence shall continue after notice from the" County Council, "to be recovered by summary proceeding."

By s. 107: ". . . No person shall be liable for the payment of any penalty or forfeiture under . . . this Act . . . for any offence made cognisable before a justice, unless the complaint respecting such offence have been made before such justice within six months next after the commission or discovery of such offence."

was made within six months next after the completion or discovery of the offence. In the same way, the six months' limitation in the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 11, does not apply. There were two separate and distinct offences, building up to a prohibited height, for which the builder has been convicted (see *London County Council* v. *Lawrance* (1)), and continuing the building at such height, for which the builders, having completed the contract and quitted the works, cannot now be made responsible: *Smith* v. *Legg* (2); *Wallen* v. *Lister*. (3) The latter offence could not be committed until the appellants had given the notice of December 23, 1893: *Rumball* v. *Schmidt*. (4) The point raised by the case is decided in favour of the appellants by *Metropolitan Board of Works* v. *Anthony* (5), and *Reg.* v. *Catholic Life and Fire Insurance and Annuity Institution* (6) is to the same effect. [He also referred to *Higgins* v. *Guardians of the Poor of Northwich Union*. (7)]

The Court called on

Dickens, Q.C. (*Charles Lloyd*, with him), for the respondent. Sects. 85 and 107 must be read together, and if the appellants' contention is correct, the limitation contained in s. 107 is inoperative with regard to continuing offences, and the County Council could enforce penalties against an innocent purchaser many years after the completion of the building. The true construction is, that the words "six months next after the commission or discovery of such offence" mean, in such a case as this, six months after the commission or discovery of the original offence of building to the prohibited height. The words in s. 85 are "a further penalty of 40*s*. for every day," &c., shewing that the person liable to the further penalty must be a person who was liable and has been convicted for the original offence. In *Metropolitan Board of Works* v. *Anthony* (5) the respondents were the persons who had committed the original offence, and the same was the case in *Reg.* v. *Catholic Life and Fire Insurance*

(1) [1893] 2 Q. B. 228.
(2) [1893] 1 Q. B. 398.
(3) [1894] 1 Q. B. 312.
(4) 8 Q. B. D. 603.
(5) 54 L. J. (M.C.) 39.
(6) 48 L. T. (N.S.) 675.
(7) 22 L. T. (N.S.) 752.

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and Annuity Institution (1), in which there was no appearance for the respondents.

Poland, Q.C., replied.

MATHEW, J. The question raised in this case depends upon the construction of certain provisions contained in the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102). By s. 85 of that statute no building, except a church or chapel, is to be erected on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of the street, without the consent in writing of the appellants; and the same section goes on to provide that "every person committing any offence under this enactment shall be liable to a penalty of 5*l.*, and, in case of a continuing offence, to a further penalty of 40*s.* for every day during which such offence shall continue after notice" from the appellants. This latter clause deals with a continuing offence, and such an offence is the continuing of a building already erected at such a height as to constitute an offence against the Act, and the clause applies to any one who is guilty of continuing at such a height, after notice has been given to him by the London County Council, a building which has already been erected.

Then comes the question of limitation. As I have pointed out, there are two offences created by s. 85, namely, building to a prohibited height, and continuing a structure already built at such a height after receiving notice from the London County Council. By s. 107 of the same Act it is provided "that no person shall be liable for the payment of any penalty or forfeiture under . . . this Act . . . for any offence made cognisable before a justice, unless the complaint respecting such offence have been made before such justice within six months next after the commission or discovery of such offence." In this particular case penalties are claimed for continuing a building at a prohibited height after notice had been given by the appellants, and the only limitation imposed by the statute in respect of such a continuing offence is that no penalty can be recovered unless the

(1) 48 L. T. (N.S.) 675.

complaint is made within six months after the commission or discovery of such offence, and the complaint was made within six months. Mr. Dickens contends that no one can be convicted of such a continuing offence except the person who originally erected the building to a prohibited height, and thereby committed the original offence, and he urges that to hold otherwise would introduce the possibility that the County Council might sue for a large number of penalties, and so act oppressively; but the answer is that the legislature must have known what powers the Act conferred, and did not consider it necessary to provide against anything so unreasonable as what has been suggested might be done.

The decision of the magistrate was wrong, and the case must go back.

KENNEDY, J. I feel compelled by the language which has been used by the legislature to come to the same conclusion, and I therefore concur in the judgment which has just been delivered. At the same time I feel some hesitation, for there might be cases which might afford temptation to a local authority not to use due diligence in enforcing the provisions of the Act, for, if they can wait (as I think on the language of the Act they can), they might put enormous pressure on an owner, for they might let a building be run up, and afterwards proceed for penalties, so as to compel the owner to pull it down. But there is the enactment, and the decision in *Metropolitan Board of Works* v. *Anthony* (1) involves the same conclusion.

Case remitted to the magistrate.

Solicitor for appellants: *W. A. Blaxland.*

Solicitors for respondent: *Poole & Robinson.*

(1) 54 L. J. (M.C.) 39.

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Aug. 8, 9, 10.

GUILFORD v. LAMBETH.

County Court—Jurisdiction—Remitted Action—Counter-claim for Unliquidated Damages—Power to order Trial in County Court—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

An action of contract brought in the High Court for a sum not exceeding 100*l.*, to which a counter-claim for unliquidated damages is pleaded, can be ordered to be tried in the county court under s. 65 of the County Courts Act, 1888.

Mackay v. *Bannister* (16 Q. B. D. 174) distinguished.

APPEAL from chambers.

The action was brought to recover 32*l.*, the price of a mare sold by the plaintiff to the defendant. The plaintiff, having failed in an application for judgment under Order XIV., applied, before delivery of defence, under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 65 (1), for an order that the action should be tried in the county court. On June 29 the master ordered the action to be tried in the county court at Kettering. On July 3 the defendant delivered a counter-claim, claiming 30*l.* for the keep of the mare, and for damages for breach of a warranty that the mare was quiet, the damages alleged being injury to the defendant's cart and harness caused by the kicking of the mare. The defendant appealed from the master's order of June 29. The appeal was heard on July 4 by Mathew, J., who was not informed that a counter-claim had been set up, and affirmed the master's order. The defendant now appealed from the order of Mathew, J.

(1) By 51 & 52 Vict. c. 43, s. 65: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.*, or where such claim, though it originally exceeded 100*l.*, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 100*l.*, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers to order such action to be tried in any Court in which the action might have been commenced, or in any Court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly."

Aug. 8, 9. *W. E. Hume Williams*, for the defendant. There is no jurisdiction to order the action to be tried in the county court, there being a claim for unliquidated damages: *Mackay* v. *Bannister*. (1) The same principle applies to cases under the Act of 1888: *Bassett* v. *Tong* (2), where it was held that an action for unliquidated damages could not be ordered to be tried in the county court.

Morton Smith, for the plaintiff. When the master made the order no counter-claim had been delivered, and the point now relied upon was not taken before Mathew, J. It is too late to take it now. *Mackay* v. *Bannister* (1) is not in point, having been decided on 19 & 20 Vict. c. 108, s. 26, which contained the words "after issue joined," and at the time when that Act came into operation there was no jurisdiction to entertain a counter-claim. *Reg.* v. *Judge of the City of London Court* (3) turned entirely on the fact that the action had been discontinued, and therefore the whole or part of the demand of the plaintiff was not contested within the meaning of the Act. [He also referred to *Percival* v. *Pedley*. (4)]

Cur. adv. vult.

Aug. 10. The judgment of the Court (Hawkins and Lawrance, JJ.) was delivered by

HAWKINS, J. This is an appeal from an order that the action shall be tried in the county court at Kettering. The action is brought to recover 32*l.* for the price of a mare, and that is clearly an action which might be ordered to be tried in the county court. The master's order that the action should be so tried was made on June 29, and there was an appeal to Mathew, J., which was heard on July 4, and was dismissed. When the master made his order no defence had been delivered, and the making of the order was not opposed on the ground that it was intended to plead a counter-claim. The attention of the master or of Mathew, J., was never called to the objection that a counter-claim was intended to be pleaded; but now we are told that we ought to reverse the orders of the master and the judge

(1) 16 Q. B. D. 174.
(2) [1894] 2 Q. B. 332.
(3) [1891] 2 Q. B. 71.
(4) 18 Q. B. D. 635.

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on the ground that on July 3, after the order of the master had been made, but before it had been affirmed by Mathew, J., a defence was delivered, including a counter-claim for unliquidated damages for breach of warranty, which, it is contended, the county court has no jurisdiction to entertain. The master was unquestionably right in making his order, for the fact now relied on did not then exist. The absence of any intimation of such an objection to the judge left him no alternative but to confirm the master. Each acted within his jurisdiction. This appeal must therefore be dismissed, and we are not disposed to allow it to be converted into a motion to set aside the order, which at the time was rightly made, even if we have the power to do so.

That would be sufficient to dispose of the case; but as the contention that the county court has no jurisdiction to entertain a counter-claim for unliquidated damages was strongly relied on, I think we ought to deal also with that point. The case of *Mackay* v. *Bannister* (1) is relied on as conclusive in favour of the appellant's contention; but we do not think that is so. When the statute on which that case was decided, viz., the County Courts Act, 1856 (2), was passed, counter-claims were unknown to our law as defences. They were first allowed by the Judicature Act of 1873: see ss. 89, 90; and substantially the judgment of Pollock, B., only decided that the enactments of the Judicature Act of 1873 did not refer back to the 26th section of the County Courts Act, 1856. That case has therefore really no bearing upon the case before us.

The County Courts Act, 1888, s. 65, is that under which the order in question was made. Nobody can doubt that counter-claims were in the contemplation of the legislature, and we find nothing which forbids the pleading by way of defence in the county court of a counter-claim for unliquidated as well as liquidated damages. The jurisdiction given is to order the plaintiff's action to be tried in the county court. The defendant has the option to set up his counter-claim or not as he pleases. In this case he has thought fit to do so even after the master's order was made. We see no ground for the defendant's contention that by so doing he can deprive the master or judge of

(1) 16 Q. B. D. 174. (2) Repealed by 51 & 52 Vict. c. 43, s. 188.

the powers conferred by the 65th section of the County Courts Act, 1888.

If for any special reason it is desirable that a counter-claim shall not be dealt with by a county court judge, application may be made under s. 90 of the Judicature Act, 1873, or s. 18 of the Judicature Act, 1884. But in the present case the success of such an application would be very doubtful, for the plaintiff's claim is only 32*l.* The defendant's counter-claim is only 30*l.*, and arises out of the same matter. We can hardly imagine a more fitting case for a county court judge to decide.

The case of *Bassett* v. *Tong* (1) does not touch this case. It only decides that the claim *of a plaintiff* for unliquidated damages cannot be remitted to the county court. It does not touch the case of a counter-claim—which could not *alone* be remitted under s. 65 at all: see *Reg.* v. *Judge of the City of London Court* (2), where it was expressly held that after a plaintiff's action has been discontinued there is no power to remit to the county court for trial the defendant's counter-claim. To the same effect is *Delobbel-Flipo* v. *Varty.* (3)

This appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Pitman & Sons, for C. W. Lane. Kettering.*

Solicitor for defendant: *Newson.*

(1) [1894] 2 Q. B. 332. (2) [1891] 2 Q. B. 71.
(3) [1893] 1 Q. B. 663.

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May 29, 31;
June 1.

[IN THE COURT OF APPEAL.]

GROSVENOR HOTEL COMPANY *v.* HAMILTON.

Landlord and Tenant—Implied Grant—Lessor and Lessee—Damage by Vibration caused by Lessor on adjacent Land—Damages, Measure of.

In an action by lessor against lessee for rent, the lessee counter-claimed for damages from a nuisance caused by the lessor. It appeared that the lessor during the lease had pumped water from land adjacent to the demised premises by means of powerful engines, and that the lessee's house was damaged by the vibration caused by the working of such engines, to such an extent that the premises became useless to him, and that he was obliged to remove his business to another house, and in consequence incurred expense. There was evidence that the house at the commencement of the term was old and unstable, and that a house of ordinary stability would not have been injured by the vibration:—

Held, that the plaintiff was liable for damages under the counter-claim, for there was an implied obligation on his part not to derogate from his grant by using his adjoining property so as to interfere with the stability of the premises which he had let, and that he could not, therefore, rely upon any defence founded upon the state of such premises at the commencement of the term:

Held, also, that the damages recoverable by the defendant were not confined to the value of the term which he had lost, but included all loss which had happened to him as a natural consequence of the wrongful acts of the plaintiff, such as the expense of removing his business to other premises.

MOTION by the plaintiffs for a new trial in an action tried before Grantham, J., and a jury, on the ground of misdirection, and that the damages awarded to the defendant under his counter-claim were excessive.

The facts as disclosed at the trial were that on March 25, 1887, the plaintiff company demised to the defendant two adjoining houses, 95 and 97, Buckingham Palace Road, for fourteen years from that day, at the rent of 250*l.* payable quarterly. The lease contained a covenant by the defendant to do all necessary repairs and to deliver up the premises at the expiration or sooner determination of the term in good repair. The company covenanted for quiet enjoyment by the tenant "without any claim or demand to the contrary by the lessors, their successors or assigns, or any person rightfully claiming by, under, or in trust for them." The lessors had a power of determining the lease at

any time by six months' notice if the premises were required by them for the purposes of their undertaking, and the lessee had an option of determining the lease at the end of the first seven years by six months' notice.

The plaintiffs, who occupied a large hotel adjoining the demised premises, had, before the tenancy commenced, sunk a well for supplying the hotel with water, and in 1888 they sunk another. The water was pumped up for the supply of the hotel by powerful engines which were very near the back of the demised premises. In 1889 one of the houses shewed signs of subsidence, and the plaintiffs underpinned it at their own expense. In 1893 further signs appeared that the houses were becoming unsafe. On April 26, 1893, the district surveyor reported that the houses were in so dangerous a condition that he must refer them to the London County Council; and the London County Council in the course of the same year obtained orders from a magistrate under the Metropolitan Building Acts for pulling down the front and front back walls of one house and the front back wall of the other.

In July the defendant removed his family from the premises, and about the beginning of September removed his business, and on September 16 gave notice to the plaintiff company that the premises were unoccupied. On September 19 he gave them notice to determine the lease at Lady Day, 1894, under the power reserved to him. The defendant paid his rent up to Midsummer, 1893, but refused to pay the quarter falling due at Michaelmas. The plaintiffs thereupon commenced this action to enforce payment of such rent. The defendant by his defence and a counter-claim claimed damages on the ground that the houses had become ruinous through the vibration caused by the engines worked by the plaintiffs, and that he had sustained serious damage by having to obtain another lease and alter the new premises so as to make them fit for his business, and by losing profits during the time that his business was being removed.

The evidence clearly shewed that the cause of the houses becoming unsafe was the vibration caused by the plaintiffs' engines. It further appeared that at the date of the lease the

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houses were old, built on piles, and by no means stable, one wall being twelve inches out of the perpendicular; and there was reason to believe that houses of reasonably solid structure would not have been injured by the vibration. The learned judge directed the jury that if the defendant's house was in fact brought down by the vibration caused by the working of the plaintiffs' engines they were liable in damages to the defendant under his counter-claim. The jury found that the injury to the houses was caused by the plaintiffs' engines. A verdict was entered for the plaintiffs on the claim for 62*l.* 10*s.*, the quarter's rent, and on the counter-claim a verdict for the defendant with damages as follows—for expenses of removal and of obtaining and adapting new premises, 195*l.* 18*s.*; loss of profits, 69*l.* 17*s.*; and as damages for loss of possession of the house, 42*l.* 10*s.*, being an apportioned part of a quarter's rent for that period before Michaelmas, 1893, which elapsed after the defendant had given up possession—total, 308*l.* 5*s.*

The plaintiffs appealed from the judgment on the counter-claim.

Witt, Q.C., and *Hume Rothery*, (*T. Terrell*, with them), for the plaintiffs. First, the learned judge misdirected the jury as to the liability of the plaintiffs; and secondly, the damages which the jury awarded to the defendant under his counter-claim were excessive. The defendant's house was old and insecure when the term commenced; and if it had not been in such a condition it would not have been injured by the vibration caused by the plaintiffs' engines. The counter-claim is based upon the working of the pumps as a nuisance; but such working was not a nuisance unless it would have been injurious to a house of ordinary stability. If a man's house is unstable his neighbour is not precluded from drawing waggons along the road in front of it for fear of shaking it down. In the same way, a man of weak nerves cannot maintain an action against a neighbour for causing noises which do not affect ordinary persons. The judge asked the jury simply whether the injury to the house was caused by the vibration; he ought to have asked them whether it was such vibration as would have damaged an ordinary house. *National*

Telephone Co. v. *Baker* (1) is distinguishable. The relation of landlord and tenant which existed between the parties makes no difference in this case. The defendant knew the house was insecure when he accepted the lease, and the plaintiffs did not covenant to keep it in repair. They have done nothing in derogation of their grant. An intermittent act by the landlord, such as working an engine, has never been held to be a proceeding in derogation of his grant. It is the same as if the act had been done by a stranger. The covenant for quiet enjoyment relates to the title to the premises, not to the structure of the house; and there being an express covenant, no other covenant for quiet enjoyment can be implied from the demise: *Robinson* v. *Kilvert* (2); *Dennett* v. *Atherton* (3); *Line* v. *Stephenson.* (4)

Secondly, the damages are excessive. The measure of damages is the value of the term of which the defendant has been deprived—that is the doctrine of all the cases: *Lock* v. *Furze.* (5)

[LINDLEY, L.J. Does it appear that in that case the party sustained any damage beside the loss of the term? Suppose a tenant at a rack-rent, whose leasehold interest is worth nothing, has to remove his business in consequence of the wrongful act done, is he to have no compensation?]

Rolph v. *Crouch* (6) proceeds on the same principle as *Lock* v. *Furze* (5); see also *Williams* v. *Burrell.* (7)

Coleridge, Q.C., and *Dale Hart,* appeared for the defendant, and having agreed that the damages should be reduced to 200*l.*, were not called upon.

LINDLEY, L.J. This appeal raises a question of some importance. An action is brought by a landlord for rent of a house, and is met by a counter-claim on the part of the tenant on the ground that the landlord has materially damaged the demised premises, so that the tenant has been obliged to remove from them, and has thereby been put to expense.

The first question is whether the tenant has any right of

(1) [1893] 2 Ch. 186.
(2) 41 Ch. D. 88.
(3) Law Rep. 7 Q. B. 316.
(4) 4 Bing. N. C. 678.
(5) 19 C. B. (N.S.) 96.
(6) Law Rep. 3 Ex. 44.
(7) 1 C. B. 402.

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action. It has been contended that the tenant's house was weak and insecure, and that the tenant is seeking to impose on his landlord a duty more extensive than that of an ordinary neighbour; for that to make vibration caused by a neighbour actionable it must be such as would damage a house of reasonable strength. If the case were not between lessor and lessee that might be so; but we are dealing with landlord and tenant, a fact which gives the case a different aspect. The house was an old one, built on piles, and not originally strong. At the time it was let one of the walls was twelve inches out of the perpendicular. The plaintiffs let the house at a rack-rent, they have damaged it by the working of their engines, and now it is contended on their behalf that there is no cause of action against them. I however am of opinion that there is—the cause of action being the vibration which has brought the house down. If we were to decide according to the plaintiffs' contention, we should be allowing the landlord to derogate from his own grant. The house was demised by the person who caused the vibration, and he cannot defeat the grant contained in the lease. This consideration gets rid of the difficulty that a covenant for quiet enjoyment applicable to this case cannot be implied. Where there is an express covenant for quiet enjoyment in a lease it excludes any implied one: *Line* v. *Stephenson*.(1) An action therefore will not lie on the ground of implied covenant, but it will lie on the ground I have stated. Before the Judicature Acts the action would have been an action on the case.

There being then a good cause of action, the question of damages arises. It is contended for the plaintiffs that the damages consist solely in the loss of the term. If the term were of value the defendant could recover its value by way of damages; but to say that the damages are confined to the value of the term is erroneous in point of law. The damages are whatever loss results to the injured party as a natural consequence of the wrongful act of the defendant. The expense of setting up in a new place is such a natural consequence. The argument for the plaintiffs has, however, convinced us that the damages are too high. A person setting up in a new place is apt to spend more

(1) 4 Bing. N. C. 678.

than is actually necessary. The defendant assenting to the damages being reduced to 200*l.*, the judgment will stand for that amount.

LOPES, L.J. The plaintiffs have obtained a verdict for 62*l.* for rent, and with that we do not interfere. The defendant has counter-claimed on the ground that the plaintiffs have shaken down his house. The covenant for quiet enjoyment is very limited, and excludes any implied one which might otherwise be implied. The defendant, therefore, cannot obtain any relief founded on a breach of covenant. But what the plaintiffs have done has substantially interfered with the convenient occupation of the defendant's house, and such interference is a nuisance and a cause of action. The plaintiffs cannot be heard to say that they were only reasonably using their own land: *Bamford* v. *Turnley.* (1) But the plaintiffs say that the house was delicate and unstable, and that if it had been sound no mischief would have been done to it by the vibration, and that injury done by vibration which would not injure a house of ordinary construction affords no ground of action. It is unnecessary to decide how the case would stand between strangers. Here the plaintiffs let the house to the defendant in the state in which it was: so they are estopped from setting up its instability. They cannot derogate from their own grant.

We think that about 200*l.* is the proper amount of damages.

DAVEY, L.J. I am of the same opinion. I think the defendant had a cause of action founded, not on an implied covenant for quiet enjoyment, but on nuisance or trespass. A grantor cannot derogate from his own grant, and therefore if, when letting a house, he retains adjoining land, he cannot use it so as to interfere with the stability of the house. This, I think, is a necessary result of the principles laid down in *Caledonian Ry. Co.* v. *Sprot* (2), *Elliot* v. *North Eastern Ry. Co.* (3), and *Rigby* v. *Bennett.* (4) It is sometimes put on the ground of implied agreement, or implied grant of a quasi easement—a right in the nature of an easement not to have anything done which disturbs

(1) 3 B. & S. 62.
(2) 2 Macq. 449.
(3) 10 H. L. C. 333.
(4) 21 Ch. D. 559.

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the stability of the property. In *Rigby* v. *Bennett* (1) the Master of the Rolls said: "If, again, they granted the house to the plaintiff as it then stood, or granted the land on which the house was standing, they granted with it, if I may say so, the easement or the implied obligation or warranty that the house should not be let down by anything done on their adjoining land." The same principle was enunciated in *Wheeldon* v. *Burrows* (2). I should look at this case in the same way, treating it as depending on an implied grant of an easement. I think, therefore, that the defendant is entitled to recover damages. As to their amount, I agree with what has been said by the other members of the Court.

Appeal dismissed.

Solicitors: *Mossop & Rolfe; J. M. McDonnell.*

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April 20.

[IN THE COURT OF APPEAL.]

YORKSHIRE WEST RIDING COUNCIL *v.* HOLMFIRTH URBAN SANITARY AUTHORITY.

River—Pollution of River—Liability of Local Authority in respect of Old Sewers—Rivers Pollution Prevention Act, 1876 (39 *&* 40 *Vict. c.* 75), *ss.* 3, 10.

By the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 3, "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act, if he shews to the satisfaction of the Court having cognizance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream."

The defendants, an urban sanitary authority, were charged under the above section with permitting sewage matter to flow into a stream within their district. It appeared that the sewage matter flowed from certain ancient sewers, within the district of and vested in the defendants, which had been constructed and which were used for discharging sewage matter into the stream before the passing of the Act, and before the defendants were constituted a

(1) 21 Ch. D. 559, at p. 567. (2) 12 Ch. D. 31.

sanitary authority. The defendants had made certain alterations in these sewers, but had done nothing to increase the pollution of the stream:—

Held, that there was primâ facie evidence that the defendants had "wilfully permitted" sewage matter to flow into the stream, and that the mere fact that they had not materially altered the nature of the sewers, and had done nothing to increase the flow of sewage matter from such sewers into the stream, was not a sufficient answer to proceedings under the Act.

APPEAL from an order of the Divisional Court (Cave and Wright, JJ.) setting aside an order of the county court for the West Riding of Yorkshire in favour of the defendants.

In June, 1893, the plaintiffs, under s. 14 of the Local Government Act, 1888, commenced proceedings in the county court against the defendants, alleging that the defendants at divers times between March 21, 1892, and April 19, 1893, "did cause and do still cause to fall or flow or to be carried, and do still knowingly permit to fall or flow or to be carried" into the River Holme and its tributaries solid and liquid sewage matter, and the plaintiffs claimed an order under s. 10 of the Rivers Pollution Prevention Act, 1876 (1), requiring the defendants to abstain

(1) Rivers Pollution Prevention Act, 1876: "Whereas it is expedient to make further provision for the prevention of the pollution of rivers, and in particular to prevent the establishment of new sources of pollution."

Sect. 3: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act, for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act if he shews to the satisfaction of the Court having cognizance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream."

Sect. 10: "The county court having jurisdiction in the place where any offence against this Act is committed, may by summary order require any person to abstain from the commission of such offence, and when such offence consists in default to perform a duty under this Act, may require him to perform such duty in manner in the said order specified. The Court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the Court seems meet."

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from the commission of the offence, and an order requiring them to use the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the said stream.

The defendants, the local board of health of Holmfirth, were constituted on September 29, 1884. At that time there were in their district several ancient sewers, mostly consisting of what were known as "rubble drains," and which had been made long before the Act of 1876 was passed. Through these sewers sewage passed into the stream in question. The defendants to a considerable extent replaced the rubble drains by earthenware pipes, about 5000 yards of which had been laid before the present action. They alleged they had not made any fresh sewers. In one case where a sewer discharged itself into a mill-pond the defendants diverted it so as to make it discharge directly into the Holme.

The county court judge found that none of the alterations of the defendants caused any increase of the pollution of the river —that in fact they had done nothing—and that they were not liable in respect of an outflow which existed before the sewers of Holmfirth came under their control. The learned judge accordingly, on January 31, 1894, gave judgment for the defendants.

The plaintiffs appealed; and on March, 1894, the Divisional Court made an order setting aside the judgment and directing a new trial, being of opinion that there was evidence before the Court of an offence under s. 3 of the Rivers Pollution Act, 1876.

The defendants appealed.

Lawson Walton, Q.C., and *Sir G. Morrison*, for the defendants. The defendants are not liable; they have only repaired sewers which were ancient, and they have done nothing to increase the nuisance. The Rivers Pollution Act is intended to restrain persons who have done something to create a nuisance. It is necessary in order to make the defendants liable that the nuisance should have been aggravated by their act, and they are not liable for merely allowing the continuance of an old system of drainage in which the inhabitants have prescriptive rights with which the defendants cannot interfere. The 17th section

of the Public Health Act, 1875 (38 & 39 Vict. c. 55), is expressed in terms similar to those of the present enactment; yet it was held in *Glossop* v. *Heston and Isleworth Local Board* (1) that the board were not liable for allowing the old state of things to continue, and that the Court will not grant a restraining order which can only be complied with by setting up a new system of drainage. In *Attorney General* v. *Guardians of Dorking* (2) it was held that no liability arose from allowing the old state of things to continue, and the language of Cotton, L.J. (p. 608), shews that neither under the Rivers Pollution Act nor the Local Government Act is a public body liable where it has done nothing. The plaintiffs are applying for a wrong remedy. If they ask for a mandamus, it will be shewn that the mischief can only be remedied by a new general system of drainage which cannot be established without the consent of the adjoining parishes. If they ask for an injunction, an injunction is not the proper remedy where the defendants have done nothing. In *Kirkheaton, &c., Board* v. *Ainley* (3) the local board was in default in not making proper drains. The plaintiffs are seeking to compel the defendants to carry out a drainage scheme, and the *Dorking Case* (2) shews that a mandamus is the proper remedy. *Attorney General* v. *Clerkenwell Vestry* (4) shews that an injunction is not.

Finlay, Q.C., and *C. M. Atkinson*, for the plaintiffs. The judges in the *Kirkheaton Case* (3) give their reasons at length, and lay down that a local board must exercise its powers to prevent the pollution of streams, and is to be taken to permit and suffer what by the proper exercise of its powers it could prevent. It is not shewn here that the board could not prevent the pollution of the river by measures less extensive than a new general system of drainage. There are methods of deodorizing sewage, and it lies on the defendants to shew that an order directing them to prevent pollution of the stream by the sewage passing through their drains is one which they could not by taking reasonable steps obey. [They were stopped.]

Walton, Q.C., in reply.

(1) 12 Ch. D. 102, 126.
(2) 20 Ch. D. 595.
(3) [1892] 2 Q. B. 274.
(4) [1891] 3 Ch. 527.

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LINDLEY, L.J. This case comes before us in such a shape that we can decide nothing except that the learned county court judge ought to reconsider the case. The facts are these. There is a plaint in the county court under s. 10 of the Rivers Pollution Act, 1876, and the ground of the plaint is that the defendants have committed an offence against the Act either by causing or by knowingly permitting sewage matter to fall or flow into a certain stream. The Rivers Pollution Act, 1876, contains a preamble which is important: "Whereas it is expedient to make further provision for the prevention of the pollution of rivers, and in particular to prevent the establishment of new sources of pollution." That preamble itself shews that the previous Acts of Parliament did not in the opinion of the legislature go far enough to prevent pollution of rivers, and decisions on the Public Health Act of 1875, or upon any other Act previous to this, will be of very little, if any, use in construing the provisions of an Act which is deliberately intended to extend the previous legislation.

By s. 3: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act." Pausing there for a moment the first question which arises is whether the nominative "every person" applies to such a body as the Holmfirth Urban Sanitary Authority. That question must be answered in the affirmative, because s. 20 says, "'Person' includes any body of persons whether corporate or unincorporate." "Person," therefore, in s. 3 is not confined to an ordinary individual, but extends to and includes such a body as we have to deal with—an urban sanitary authority.

The next question is whether the person causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any sewage matter. The facts are apparently these: The sewers were old sewers used by the inhabitants of Holmfirth before the existence of the urban sanitary authority, and what the defendants have done, as I understand it, is this—they have repaired the old drains by putting in some new pipes—I suppose

the ordinary glazed sewer pipes—and they have straightened the sewer's outfall so as to shift the outfall which used to be in the old mill-tail into the river. That is what they have done. The substitution of the pipes has not been a small matter, because they have substituted, we are told, some 5000 yards, which is about three miles. What the effect of that may be I do not know; whether the old sewers were so out of condition that a good deal of leakage took place so that the sewage getting into the river was less than it is now that these new glazed pipes are put in I do not know. But the learned judge of the county court finds as a fact, and I take it that it is right, that there has been no material increase of sewage—that that work done, both the straightening of the sewers and the substitution of glazed pipes for the rubble drain has not appreciably increased the mischief. I think that is the result. Under those circumstances, I do not find that the board have caused this sewage to flow into the river; but have they knowingly permitted it so to flow? Primâ facie I take it that the owner of a sewer which discharges itself into a river knowingly permits that discharge. If he could shew that he does not knowingly permit it because he cannot prevent it it would be competent for him to do so; but there is no evidence of that sort here. It may be and probably is true, that individuals have a right to pour their sewage into the sewer. It does not follow from that that the local board have no power to prevent that sewage matter from falling into the river undeodorized and undealt with. At all events, there is no evidence before the learned county court judge adduced by the defendants to shew that what is done is that which by law they cannot prevent. Under these circumstances, it appears to me that there is a primâ facie case made out against the defendants that they do in the terms of this Act of Parliament knowingly permit the sewage matter in those their own sewers to fall into this river. That being the case, what is the duty of the learned county court judge? His duty is to consider under s. 10—which I will read presently—what ought to be done. But he has not done that. He has stopped short. He has construed this Act of Parliament in favour of the defendants, and has in substance held that he has nothing to do

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with the case except to dismiss the plaint because the defendants have done nothing. That is to say, in my judgment, he has misconstrued s. 3. He has held that they have not committed any breach of s. 3 because they have simply allowed matters to go on as they were. He treated as immaterial the substitution of the glazed pipes for the rubble drains and the straightening of the sewer. There I think he was wrong.

The next passage in s. 3 is important: "Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act if he shews to the satisfaction of the Court having cognizance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream." Now, the learned county court judge has not gone into that question. He has held that the defendants, having done nothing except let matters go on as they were before, are not within the earlier part of the section. I think he ought to have gone further, and ascertained whether they could or could not do, or whether they had or had not done, that which if they had done it would have been an excuse under the clause which I have just read.

Now s. 10, under which this plaint is taken out, runs thus: "The county court having jurisdiction in the place where any offence against this Act is committed may" [not "shall"] "by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this Act may require him to perform such duty in manner in the said order specified. The Court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the Court seems meet." Then there is power to consult experts for information, and so on.

The learned county court judge has not got so far as to make or attempt to make any order under this section. It is quite obvious to my mind that the word "may" there means "may," not "shall," because amongst other things which he can do is to grant an injunction. An injunction is always discretionary. The Court will not grant injunctions to compel people to do what they cannot do, and that is really one part of the decision in the *Glossop Case* (1) and the *Dorking Case* (2); and if the learned county court judge comes to the conclusion that an injunction will be of no use, or if he finds that he is unable to make any order which will work, it is not incumbent upon him to make an order which will be useless when he has made it. But it is his duty, as I understand this Act of Parliament, to apply his mind to the case to see if any and what order can be made which will have the effect of compelling the defendants to keep this foul matter out of the stream. He has not gone so far. All we decide, and all the Divisional Court decided, is that he has stopped too soon, and the case ought to go back for further consideration.

With reference to the authorities, I do not think there is any difficulty. Certainly, I do not understand the *Glossop Case* (1) or the *Dorking Case* (2) as touching the present case. If the learned county court judge had granted an injunction, and it could be shewn that the injunction could not be complied with, it would have been a reason for invoking those authorities; but we have not come so far as that. It may be, for anything I know, that the learned county court judge will come to the conclusion that no order which he could make under s. 10 would be a right order to make. If that is so, he need not make it. That appears to me to get rid of those cases altogether. As I read the decisions, both the *Glossop Case* (1) and the *Dorking Case* (2) proceeded upon grounds which have no application to a plaint before the county court judge under s. 10; further than that they may induce him not to grant injunctions in cases where he sees an injunction cannot be complied with, or where he sees that a mandamus and not an injunction is the proper remedy. As to the *Clerkenwell Case* (3), it is of the same character. You do

(1) 12 Ch. D. 102. (2) 20 Ch. D. 595. (3) [1891] 3 Ch. 527.

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not grant an injunction against a man with a view of compelling him to bring actions against a number of people. That is the ground of Romer, J.'s, decision in that case. I think, therefore, we are deciding nothing of any use to anybody except this, that it is the duty of the learned county court judge to apply his mind to this case and see what order, if any, he can properly make, and, if he can make an order which will be of use, he ought to make it.

LOPES, L.J. I am entirely of the same opinion, and have very little to add. I think that the learned judge has acted prematurely in this instance. He seems to have put a construction upon s. 3 which I do not think it bears. He appears to have thought that if the defendants had done nothing, but had merely permitted things to remain in statu quo, they would not be brought within the purview of this section. I do not think that is the right view. I am not prepared myself to say that they have done nothing. On the contrary, they have made a very considerable alteration. They have substituted for the old rubble drains three miles of glazed pipes. What the effect of that may be, whether it caused more sewage to fall and be carried into the stream, I am not prepared to say; but I cannot say they have done nothing. Even if they had done nothing, I do not think that would be a sufficient answer, because it is quite possible that by the having done nothing on an occasion when they ought to have done something, they may have caused that to happen which was intended to be prevented by this section.

There are answers which no doubt might be made out by the defendants. I presume that if they could prove that they could not prevent this sewage falling into the stream, that at any rate would be an answer to the complaint, because I find that Bowen, L.J., in the *Kirkheaton Case* (1) says: "It might possibly be an answer to the complaint that they had neglected their duty to deal with the sewage in their sewers if they could shew that they were actually without the means of disposing of it, and had not the power in any reasonable way to dispose of it; but I shall wait until a local board can satisfy me that it is in

(1) [1892] 2 Q. B. 274, at p. 284.

such an unfortunate position before I decide that question. In this case there does not appear to me to be anything to shew that the plaintiffs are in that position; on the contrary, on the materials before me, I cannot but think there are means by which they could deal with the sewage in these sewers so as to prevent its finding its way into the stream. If they have the power, they are bound to do so. Therefore I think that they themselves are within the section as persons who permit the sewage to flow into the stream." Now, it appears to me that those expressions of the learned Lord Justice are applicable to this case. One is unwilling to express any decided opinion with regard to any matters which might arise on the evidence before the county court judge; but it does suggest itself as possible that by cesspools or filtration or otherwise the fall of the sewage into the river might be prevented. I entirely concur with my brother Lindley in the view that the learned county court judge has acted prematurely, and that the case ought to go back to him in order that he may hear the evidence, and then determine what, in his opinion, ought to be done under s. 10 of the Act. The appeal will, therefore, be dismissed.

Appeal dismissed.

Solicitors: *Learoyd, James, & Lovell, for Learoyds, Huddersfield; Badham & Williams, for Trevor Edwards, Wakefield.*

H. C. J.

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July 2, 3, 16.

[IN THE COURT OF APPEAL.]

ROCHDALE CANAL COMPANY *v.* BREWSTER.

Poor-rate—Exclusive Occupation—Docks.

The Mersey Docks and Harbour Board were empowered by their special Act, upon such terms and on payment of such rates or other sums of money and subject to such restrictions and regulations as they might think proper, to set apart and appropriate any particular portion of any dock, wharf, quay, warehouses or sheds for the exclusive accommodation and use of any company, firm, or individual engaged in carrying on any particular trade; but such company, firm, or individual were to be subject to the general rules and regulations of the board. And they had also power to construct depôts, sheds, cranes, and other machinery, and make charges for the same, and to let such sheds and any portions of the quays and berths at such rents and on such terms as they might deem expedient.

The board agreed to set apart and appropriate to the plaintiffs, who were a canal company, and the plaintiffs agreed to occupy, a berth 200 feet in length with the quay opposite thereto, the appropriation to be determinable at six months' notice, at a fixed yearly rent, which was to include the interest of the cost of two cranes erected on the premises; the plaintiffs were to pay all rates and taxes assessed on the premises, except such as were legally chargeable to the landlords; the plaintiffs were to keep the premises in repair, and conform to the rules and regulations of the board, and to allow the board at all times to have free access to the premises. The board reserved a right of re-entry on non-payment of rent or non-performance of the conditions of the agreement.

The plaintiffs having been rated to the poor-rate in respect of their alleged occupation of the premises:—

Held, that, having regard to the intention of the parties, as expressed in the agreement, the board had not parted with the exclusive possession of the premises, and that the plaintiffs were not rateable in respect of their occupation.

Allan v. *Overseers of Liverpool* (Law Rep. 9 Q. B. 180) followed.

APPEAL from a decision of a Divisional Court (Wright and Bruce, JJ.) upon a special case stated under Order XXXIV., r. 1.

The facts, as stated in the special case, were shortly as follows:—

The defendants were overseers of the poor for the township of Bootle-cum-Linacre, in the county of Lancaster. The plaintiffs were rated as occupiers of property described as "cranes, quays, land and water berths," and the defendants claimed to levy on the property a poor-rate amounting to 37*l.* 10*s.* The property formed part of one of the Liverpool docks known as the

South Carriers' Dock. The Liverpool Docks are vested in and managed by the Mersey Docks and Harbour Board, under the provisions of the Mersey Dock Acts Consolidation Act, 1858, and the Mersey Docks (Corporation Purchase) Act, 1861, and certain by-laws made thereunder.

By s. 64 of the Mersey Dock Acts Consolidation Act, 1858 (21 & 22 Vict. c. xcii.), it was enacted that "The board may from time to time if they shall deem it expedient, but not otherwise, and upon such terms and conditions and upon payment of such rents or other sums of money and subject to such restrictions and regulations as they shall think proper, set apart and appropriate any particular portion of any dock, wharf, quay, warehouses, sheds, or other works, with the appendages thereto, for the exclusive accommodation and use of any canal or railway company, or of any company or firm or individual engaged in carrying on any particular trade who shall be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or employed and conveyed by them: Provided that every company, firm, or individual to whom such exclusive accommodation as aforesaid shall be afforded, and their vessels, crews, servants, and other persons employed by them or under their control, shall be subject to the general rules and regulations of the board applicable to their docks, wharves, warehouses, sheds or works, and the vessels entering the same, and the crews and other persons employed in and about such vessels."

By s. 80 the exclusive jurisdiction and management of the quays were vested in the board, and were not to be interfered with by any person whomsoever. By s. 82 the board was empowered to construct such depôts and sheds for the reception of goods, and to construct and erect such steam-engines, cranes, hoisting and weighing machines, and other apparatus and conveniences for the loading and discharge of vessels as they should think expedient, and to make reasonable charges for the same, and to "let any such sheds, and also any portions of the quays which, with or without such sheds, they may think fit to appropriate as special berths for vessels in any particular trade or otherwise, for such periods and at or on such rents, terms, and conditions as they may deem expedient."

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By s. 354 power was given to the board to sell absolutely or to let for twenty-one years any land which might be vested in them, and which was not required by them.

By an agreement dated April 6, 1893, between the Mersey Docks and Harbour Board and the plaintiff company, the board agreed to set apart and appropriate to the use of the plaintiff company, and the company agreed to occupy upon the terms and conditions thereinafter contained, a certain berth 200 feet in length therein described, together with the quay space opposite thereto; and it was agreed that the appropriation of the said premises should be deemed to have commenced on June 6, 1892, and to be determinable at any time by either party giving six calendar months' notice in writing; that the company should pay to the board for the appropriation of the said premises the yearly rent of £454 10s., which included interest on the cost of two cranes erected by the board, such rent to be paid free from all deductions, except property tax and the landlord's legal proportion of sewerage, water rates, and other rates and taxes legally chargeable to the board as landlords; and the company agreed to pay all rates, taxes, and assessments payable in respect of the premises during the continuance of such appropriation except as aforesaid.

The 6th clause of the agreement provided that the company should at their own cost maintain and keep the premises in good tenantable repair and condition during the continuance of the appropriation.

By the 7th clause the company agreed at all times to allow the servants and officers of the board to have free access to all parts of the premises, and to conform to such by-laws and regulations of the board as should be applicable to the premises.

The company also agreed by clause 9 not to assign or underlet the premises without the consent of the board; and by clause 13 the board reserved a right of re-entry in case of non-payment of the rent or non-performance of the conditions contained in the agreement; and by clause 14 the board agreed that the company paying the said rent and observing the said terms and conditions should quietly hold and enjoy the premises without lawful interruption from the board or any person claiming under them.

On August 22, 1893, the plaintiffs gave notice to the board to determine the agreement at the expiration of six months.

The quay space appropriated by the plaintiffs lay between the dock and the street, and was not fenced in or divided in any way therefrom. The defendants claimed payment from the plaintiffs under a poor-rate for twelve months from March 27, 1893.

The defendants distrained for this poor-rate, and the plaintiffs replevied. The judgment of the Court was asked whether the distress was valid. The Divisional Court held that the distress was invalid, and the defendants appealed.

Bigham, Q.C. (*Carver*, with him), for the appellants. The question is whether by the agreement set out in the special case the canal company are in such exclusive possession of the premises which they occupy for the purposes of their trade as to make them rateable to the poor. It is submitted that they are. The Divisional Court held, first, that the Mersey Docks Company had not by their Act of 1858 (21 & 22 Vict. c. xcii.) any power to part with the exclusive possession of any portion of their premises; and, secondly, that assuming they had the power, they had not exercised it; and they regarded the canal company merely as licensees. The Court based their decision upon *Allan* v. *Overseers of Liverpool* (1); but that case proceeded upon s. 64 of the Act, whereas this case is governed by s. 82, and the facts upon which the Court there decided were different from the facts in this case. By s. 82 the dock company are authorized in the widest terms to let their sheds and quays, and that is what this agreement purports to do. Clause 7 of the agreement gives to the dock company a right of re-entry which would be unnecessary unless the canal company had the exclusive possession of the demised premises. That clause was probably inserted with a view to s. 80, which gives the exclusive management of the quays to the dock company. As to the nature of the occupation required for rating purposes, see *Mayor of Southport* v. *Ormskirk Union Assessment Committee* (2).

[LINDLEY, L.J., referred to *Paris and New York Telegraph Co.*

(1) Law Rep. 9 Q. B. 180. (2) [1893] 2 Q. B. 468, 473, per Cave, J.

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v. *Penzance Union* (1), and *Lancashire and Cheshire Telephone Co.* v. *Overseers of Manchester.* (2)]

Assuming that s. 82 does not give the dock company power to part with the exclusive occupation of the quays, they have power under s. 354 which authorizes them to sell or lease any land which they do not require.

Poland, Q.C., and *C. A. Russell*, for the respondents. This case is covered by *Allan* v. *Overseers of Liverpool* and *Inman* v. *Overseers of Kirkdale.* (3) The dock company intended to reserve to themselves the general control of the premises, and therefore they have not parted with the exclusive occupation in such a way as to make the canal company liable to the rate: *London and North Western Ry. Co.* v. *Buckmaster* (4); *Smith* v. *Lambeth Assessment Committee* (5); *Reg.* v. *St. Mary Abbot's, Kensington* (6); *Reg.* v. *Abney Park Cemetery Co.* (7) To justify an occupier in being rated he must have "full dominion over the land": *Cory* v. *Bristow* (8); *Reg.* v. *Stevens* (9); *Roads* v. *Overseers of Trumpington.* (10) The 6th clause of the agreement shews that this was not a demise, but an appropriation of a particular portion of the dock, and that the dock company still retained the dominion over it.

Bigham, Q.C., in reply.

LINDLEY, L.J. The question raised by this appeal is whether the Rochdale Canal Company is properly rateable to the poor in respect of certain property belonging to the Mersey Docks and Harbour Board, but used and to some extent occupied by the Rochdale Canal Company under an agreement dated April 6, 1893.

Before referring to the terms of that agreement, I desire to point out that the Mersey Docks and Harbour Board are not parties to the action in which the above question arises and are not before the Court, and that the Court is not called upon to decide, and is not in a position to decide, whether the Rochdale

(1) 12 Q. B. D. 552.
(2) 14 Q. B. D. 267.
(3) Law Rep. 9 Q. B. 180.
(4) Law Rep. 10 Q. B. 70, 444.
(5) 10 Q. B. D. 327.
(6) 12 A. & E. 824.
(7) Law Rep. 8 Q. B. 515.
(8) 2 App. Cas. 262, 280.
(9) 12 L. T. (N.S.) 491.
(10) Law Rep. 6 Q. B. 56.

Canal Company is bound, as between themselves and the Mersey Board, to pay or to indemnify the Mersey Board against the payment of the poor-rate which is payable in respect of the property in question. The point to be decided on the present occasion is simply whether the overseers of the parish in which that property is situate are or are not entitled to rate the Rochdale Canal Company to the poor in respect of that property. This question depends on the nature of the property and on whether the Rochdale Canal Company are in such occupation of it as to render them rateable in respect of it. To determine these matters it is necessary to examine the agreement under which the Rochdale Canal Company are entitled to use and occupy the property. [The Lord Justice read the principal clauses of the agreement, and continued:—]

The property described in clause 1 of the agreement is clearly land in respect of which poor-rate is payable. The berth is, I apprehend, land covered with water, and not so much water only. The term "occupy," the rent to be paid, the treatment of the Mersey Board as landlords, the provision as to repair, and, above all, the provision for re-entry and quiet enjoyment, all point to a letting and taking of so much land, and not merely to the creation and enjoyment of a mere easement or licence to use. But for rating purposes it is essential to look further and to see what kind of occupation the person sought to be rated really has. The decisions referred to in the argument of *Allan* v. *Overseers of Liverpool*; *Inman* v. *Overseers of Kirkdale* (1), and *London & North Western Ry. Co.* v. *Buckmaster* (2), shew that an occupation of land which is at all times subject to the control of the owner is not such an occupation as to render the occupier rateable to the poor. The appellants contended that these cases were wrongly decided, and the Court was invited to overrule them. But they have stood for twenty years, and, it being clear law that the occupation of a lodger does not render him rateable, it is obvious that the above decisions cannot be held to be wrong in principle. These cases, in my opinion, govern the present. The 7th clause of the agreement is all-important: it was no doubt inserted in order to preserve to the Mersey Docks and Harbour

(1) Law Rep. 9 Q. B. 180. (2) Law Rep. 10 Q. B. 70, 441.

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Board the right to exercise the powers conferred upon them by s. 80 of their Act of 1858. [The Lord Justice read the section.] Even if the board had power under s. 82 to let any part of their quays free from their jurisdiction and management, they have carefully abstained from doing so in this instance. In the face of clause 7 of the agreement, and of s. 80 of the Act, it is impossible to hold the Rochdale Canal Company to have that exclusive occupation which is essential to render them rateable.

The decision appealed from was correct, and the appeal must be dismissed with costs.

LOPES, L.J. The point in this case is whether such exclusive possession has been parted with by the board as is necessary to make the respondents liable to pay rates.

In determining this question, it is the intention of the parties which has to be looked at: it is not the words only that are to be regarded. The whole of the circumstances must be taken into consideration. It is the substance of the transaction rather than the form that determines the question whether such an exclusive occupation exists as will make the property rateable. In this case I have come to the conclusion that there is such a predominating right of control reserved to the board as to prevent the occupation being so exclusive as to be rateable. In my judgment, what passed to the respondents was the licence to use the accommodation of the cranes, quays, land and water berths subordinated to the superintending control of the board—a mere incorporeal right. They could not exclude the board. This is manifest from paragraph 7 of the agreement, and also from s. 80 of 21 & 22 Vict. c. xcii., both of which have been read by Lindley, L.J.

To my mind, this case is not unlike the case of *Reg.* v. *Inhabitants of St. Mary Abbot's, Kensington.* (1) That was a case of the rating of a cemetery incorporated under an Act of Parliament. It appeared that the company sold in perpetuity the exclusive right of burial therein, subject to the rules and regulations of the company and to payment of burial fees to them. The board were rated in respect of the profits arising

(1) 12 A. & E. 824.

from the sale of these rights. It was contended that the company having parted with the exclusive right of burial, which was the only right that could be exercised over the land, had conveyed away the land itself, and were therefore no longer occupiers of the land. The Court decided that the company were in occupation of the cemetery as a whole. I read the case on account of what was said by Lord Denman. He said this: "The company are occupiers of the whole premises. The cemetery is under their control and superintendence"—the same as it appears to me in this case. Then Littledale, J., says this: "The purchasers have nothing but a right to certain mode of enjoying portions of the land from which the company derive a profit." Williams, J., says: "No doubt the company are in the occupation of the whole cemetery. They have the regulation and the repair of it, and the general superintendence over it."

Then, again, there are the two cases of *Allan* v. *Overseers of Liverpool* and *Inman* v. *Overseers of Kirkdale* (1), and they are important because they are, as I understand, upon the same Act of Parliament.

In those cases I find that the question was whether certain persons were rateable, the Mersey Docks and Harbour Board under the powers of their Act having appropriated as here certain accommodation in the docks for their particular use—in one case certain berths for the use of steamers, and in the other case a space as a coal depôt. The Court held that under all the circumstances of the case, looking at the powers given by the Act to appropriate certain parts of the land for the use of particular persons, the occupation was not taken out of the Mersey Dock Board and conferred on the appellants, but the possession and control remained in the board subject to the rights conferred, and that no exclusive occupation passed. It seems to me that both those cases are strongly in point here.

There is only one other case to which I will call attention, and that is the *London and North Western Ry. Co.* v. *Buckmaster*. (2) That is a very important case. It appeared in that case that the railway company had been rated for the whole

(1) Law Rep. 9 Q. B. 180. (2) Law Rep. 10 Q. B. 70, 444.

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of their station, including a stable which was the stable in question. They appealed against the rate, and it was contended that if the agreement was looked at, and the situation of the stable in question was looked at, there was only a licence to use the stable accommodation, and the Court so decided. But the importance of that case to my mind is what was said by Quain, J., in his judgment in the Queen's Bench. He there says (at p. 78): "I have looked at the whole substance of what appears to be the arrangement between the parties. It is clear that before this arrangement these stables were a part of the railway-station premises at that particular place at Clapham Junction; and these stables are within the curtilage, which curtilage is undoubtedly, taking it as a whole, practically in the possession and occupation of the railway company. These stables can only be approached by the roads over which the railway company undoubtedly have exclusive control, and they are entered by gates at the end of these approaches, which I think we may fairly infer are under the control of the railway company. And therefore the railway company seem to be in possession and occupation of the whole of these premises very much in the way the cemeteries were held, in the two cases that have been cited, to be under the control and in the possession of the cemetery companies. When we come to look at the agreement, no doubt it contains ambiguous expressions"—such as letting and re-entering, as in the present case—"which may be construed either way; but if we look at the convenience of the thing and the situation of the premises, and the general control evidently exercised, and intended to be exercised, over these stables of the railway company by the provision with regard to the by-laws, I come to the conclusion that on the whole these stables are not in the occupation, in the strict sense of the word, of the Clay Cross Company or the other coalowners, but remain in the occupation of the railway company, and that the railway company are the proper persons to be rated."

Now, it appears to me that that judgment is much in point in the present case. The case, I know, afterwards went to the Exchequer Chamber, and in the Exchequer Chamber three judges held one way and three judges held the other. That

being so, the judgment of the Court below prevailed. Upon reading all those judgments, it seems to me that there is no judgment to which I can attach so much importance as to the judgment of Quain, J., which seems to me to be very closely associated with the circumstances of the case which we have now to decide.

I think, therefore, that this appeal must be dismissed and the decision of the Court below affirmed.

DAVEY, L.J. I am of the same opinion, and I do not think it necessary to repeat the reasons which have been given. In my opinion, the case is governed by the case of the *London and North Western Ry. Co.* v. *Buckmaster* (1), which I am unable to distinguish from the case before us upon principle.

Appeal dismissed.

Solicitors for plaintiffs: *Norris, Allens, & Chapman, for George Jackson, Rochdale.*

Solicitors for defendants: *Sharpe, Parker & Co., for Cleaver, Holden & Co., Liverpool.*

M. W.

LOVEJOY *v.* COLE.

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Aug. 7, 8, 9, 10.

County Court—Jurisdiction—Balance not exceeding 50l.—Admitted Set-off—Admission by Plaintiff only—Costs of Action in High Court—Rules of Supreme Court, 1883, *Order* LXV., *r.* 12—*County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 57.

By Order LXV., r. 12, in actions founded on contract, in which the plaintiff recovers a sum not exceeding 50*l.*, he is entitled to no more costs than if he had sued in the county court, unless otherwise ordered.

By s. 57 of the County Courts Act, 1888, the county court has jurisdiction where the claim consists of a balance not exceeding 50*l.*, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff.

A special indorsement on a writ stated the total claim as 148*l.* 1*s.*, and gave credit "by payments on account and contra 25*l.*," reducing the claim to 123*l.* 1*s.* The plaintiff recovered 50*l.* only.

Held, that the set-off, being admitted on the writ by the plaintiff, and

(1) Law Rep. 10 Q. B. 70, 444.

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adopted and acquiesced in throughout by the defendant, was sufficient evidence to justify the conclusion that it was an admitted set-off within the meaning of s. 57, and the action could have been brought in the county court, and therefore the plaintiff was only entitled to costs on the county court scale.

APPEAL from chambers.

The action was brought to recover a surveyor's charges, and the claim indorsed on the writ was 148*l.* 1*s.* The special indorsement continued as follows, "by payments on account from time to time and contra 25*l.*," which reduced the amount of the claim to 123*l.* 1*s.* The action was referred, and 50*l.* was awarded to the plaintiff. Grantham, J., reversing the decision of the master, ordered the costs to be taxed on the county court scale, and from this order the plaintiff now appealed. (1)

Aug. 7, 8, 9. *Ritter*, for the plaintiff. The plaintiff is entitled to costs on the High Court scale. If the action could have been brought in the county court no doubt it would be difficult to support this contention: *Millington* v. *Harwood* (2); but if the action could not have been brought in the county court Order LXV., r. 12, does not apply: *Saywood* v. *Cross.* (3) This action could not have been brought in the county court, for there is no "admitted set-off" within the meaning of s. 57 of the County Courts Act, 1888. These words mean a set-off admitted before action by both parties, not merely by the plaintiff: *Hubbard* v. *Goodley* (4); *Goldhill* v. *Clarke.* (5)

Herbert Reed, Q.C., and *Clayton*, for the defendant. The plaintiff is only entitled to costs on the county court scale, for the amount recoverable by the plaintiff was reduced to 50*l.* by

(1) By the Rules of the Supreme Court, 1883, Order LXV., r. 12: "In actions founded on contract, in which the plaintiff recovers, by judgment or otherwise, a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to, had he brought his action in a county court, unless the Court or a judge otherwise orders."

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 57: "Where in any action the debt or demand claimed consists of a balance not exceeding 50*l.*, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the Court shall have jurisdiction to try such action."

(2) [1892] 2 Q. B. 166.

(3) 14 Q. B. D. 53.

(4) 25 Q. B. D. 156.

(5) 68 L. T. (N.S.) 414.

the admission in the special indorsement on the writ, by which credit is given to the defendant for 25*l.* This is a set-off which appears on the writ to be admitted by the plaintiff, and this is sufficient: *Percival* v. *Pedley.* (1)

[LAWRANCE, J. That case seems to shew that if the set-off is admitted by the plaintiff it does not matter whether it is admitted by the defendant or not.]

That is so, and therefore the action could have been brought in the county court, and Order LXV., r. 12, applies, and its application is not affected by s. 116 of the County Courts Act, 1888: *Millington* v. *Harwood.* (2)

Ritter, in reply, referred to *Woodhams* v. *Newman* (3); *Hodgson* v. *Bell.* (4)

Cur. adv. vult.

Aug. 10. The judgment of the Court (Hawkins and Lawrance, JJ.) was delivered by

HAWKINS, J. In this case the plaintiff brought an action in the High Court claiming as the total amount originally due to him 148*l.* 1*s.*, and in the special indorsement on the writ he gave credit for 25*l.*, reducing the amount of his claim to 123*l.* 1*s.* The words by which the credit is given in the indorsement on the writ are "by payments on account from time to time and contra 25*l.*" It is not very clear what "and contra" means here. The master thought it referred to money due from the plaintiff to the defendant for goods sold and delivered; that view was adopted for the purpose of the argument, and we therefore assume it to be correct. The action was referred to arbitration, and the arbitrator found that of the balance claimed after giving credit only 50*l.* was due to the plaintiff, and the plaintiff recovered only that amount. The question which now arises is whether the costs ought to be taxed on the High Court scale or on the county court scale. That depends on whether the action was one which could have been brought in the county court; for if it was, it was fairly conceded that the plaintiff must

(1) 18 Q. B. D. 635.
(2) [1892] 2 Q. B. 166.
(3) 7 C. B. 654; 18 L. J. (C.P.) 213.
(4) 24 Q. B. D. 525.

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fail in his appeal. But it is said on behalf of the plaintiff that "an admitted set-off" mentioned in s. 57 means a set-off which was admitted both by the plaintiff and the defendant before action brought, and that there was no such admitted set-off in the present case.

We do not assent to this view of the law. We are of opinion that a person proposing to sue another for a debt, whatever may be its amount, knowing that he is indebted to the person he so proposes to sue in a sum of money which can be set-off against his own claim, may before action admit such set-off, and give the defendant credit for it in reduction of his own demand without any formal assent or admission of the proposed defendant, and sue simply for the true balance alleged to be still due. Such set-off so admitted by the proposed plaintiff is, in our opinion, "an admitted set-off" within the meaning of s. 57.

If with such an admitted set-off the proposed plaintiff finds his own claim reduced to a sum for which he might sue in the county court, he is not thereby deprived of the *right* to proceed in the High Court; but if he does so, he of course incurs the risk of getting no costs on the High Court scale. Again, if the balance of his claim, as reduced by such set-off, still exceeds the county court jurisdiction, he *must* sue in the High Court; but if in the result he *recovers* a sum not exceeding 50*l.*, he gets but county court costs at the most, unless he obtains a judge's order or certificate entitling him to more.

This seems to us to be the condition of the present plaintiff.

We are not aware of any case in which a judicial construction has been put upon the words "*claimed, or recoverable*" used in s. 57, but we think that "*claimed*" applies to a sum actually claimed by the defendant. To require a sum claimed to be further admitted by the defendant seems useless. It is rather more difficult to understand what meaning the legislature intended to be given to the word "*recoverable*," for it is impossible for anybody to fix with certainty the sum recoverable until final judgment, though an approximate opinion may be formed. It seems to us, therefore, that the word "recoverable" may fairly be interpreted as pointing to a sum which at the time the action is commenced the plaintiff reasonably and honestly believes the

defendant is entitled to set off against him; that sum the plaintiff is, as we think, entitled to admit as "recoverable" from him, even though in the result the defendant may succeed in establishing a set-off to a larger amount. Adopting this construction, neither the plaintiff nor the defendant can be prejudiced. The plaintiff may admit that which he considers due to the defendant, and remove such amount at least from all further controversy. The defendant if he is not satisfied with such admission is not bound by it, but may deliver a plea of set-off, and counter-claim the full amount he considers due to him.

The 57th section does not contain a word requiring the defendant formally to admit his own claim; that he does so may well be taken for granted; it speaks only of "an admitted set-off." Full effect may be given to those words by enabling the plaintiff to admit, in reduction of his own claim, the full amount he is willing to concede as due to the defendant, and to give credit for that, and thus to sue only for the balance due to him —a course which seems to be right and reasonable.

The view we have taken seems to be that entertained by Mathew and Cave, JJ., in *Percival* v. *Pedley*. (1)

The case of *Hubbard* v. *Goodley* (2), decided by Huddleston, B., and Grantham, J., is undoubtedly at variance with *Percival* v. *Pedley* (1); but we prefer to adopt the decision in the latter case so far as it applies to the question before us.

We do not think it necessary to discuss the older cases referred to: *Woodhams* v. *Newman* (3); *Beswick* v. *Capper* (4); *Avards* v. *Rhodes* (5), &c., &c. These, carefully considered, are all distinguishable from the present, and on very obvious grounds. *Walesby* v. *Goulston* (6), so much relied on by Huddleston, B., in *Hubbard* v. *Goodley* (2), was decided upon the ground that there was no admission of the set-off by the plaintiff before action—it was not necessary to decide the point before us; but Willes, J., evidently did not dissent from the view we have taken. The rest of the Court merely expressed a doubt. *Goldhill* v. *Clarke* (7),

(1) 18 Q. B. D. 635.
(2) 25 Q. B. D. 156.
(3) 7 C. B. 654.
(4) 7 C. B. 669.
(5) 8 Ex. 312.
(6) Law Rep. 1 C. P. 567.
(7) 68 L. T. (N.S.) 414.

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also cited in the argument, really throws no light on this point.

There is, however, more in this case than the mere construction of the words of s. 57.

The mode in which this action was conducted on both sides affords evidence which abundantly satisfies us that *there was in fact* a fully *admitted and altogether undisputed set-off* for which the plaintiff rightly and intentionally gave credit on his writ; and even if the form of his indorsement was somewhat loose and informal, the plaintiff ought not now to be allowed to repudiate it by relying on his own informality for the mere purpose of getting costs on a higher scale than he would have been entitled to had he been as formal and regular as he intended to be.

From first to last it was never questioned by either the plaintiff or the defendant, but was tacitly admitted by both, that the 25*l.* credited fully covered and included every farthing of payment or set-off which could have been pleaded or claimed in reduction of the plaintiff's original demand of 148*l.* 1*s.*: both parties treated it as correct, and nobody even now suggests it was not.

Upon the faith of it the defendant abstained from pleading either payment or set-off; and upon the understanding on both sides that the credit indorsed on the writ was correct the case was conducted from beginning to end. The amount of such set-off and payment, and the corresponding part of the claim covered by them, were treated as out of the action altogether, the only question at issue between the parties, and presented to the arbitrator, being whether and to what extent the plaintiff's charges were excessive. In the result, overcharges were established to an extent sufficient to reduce the 123*l.* 1*s.* claimed to be remaining due to the plaintiff to the 50*l.* recovered, for which the plaintiff might have sued in the county court.

For the reasons above given, we dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for plaintiff: *Taunton & Dade.*

Solicitors for defendant: *H. & G. Keith, for Camp & Ellis, Watford.*

P. B. H.

[IN THE COURT OF APPEAL.]

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March 9, 10, 20.

BAIRD *v.* MAYOR, &c., OF TUNBRIDGE WELLS.

Local Government—"Street"—"Public Place"—Construction of Urinals below Surface of Ground—Tunbridge Wells Improvement Act, 1890 (53 *&* 54 *Vict. c. ccxxxv.*), *s.* 93—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 39, 149.

Before the passing of the Tunbridge Wells Improvement Act, 1890, an agreement was entered into between the lord of the manor of Tunbridge Wells and the freehold tenants, by which it was provided that certain promenades on the waste of the manor should remain open and free for the public use of persons frequenting Tunbridge Wells "in the manner the same now are or have lately been used." This agreement was confirmed by special Act of Parliament. It did not appear that such promenades were highways repairable by the public at large.

By the Tunbridge Wells Improvement Act, 1890 (53 & 54 Vict. c. ccxxxv.), s. 4, the word "street" is to have the same meaning as is assigned to it by the Public Health Acts. By s. 93, the corporation of Tunbridge Wells "may erect in any street or public place or on land belonging to them water-closets, urinals, and lavatories for the use of the public."

The corporation, assuming to act under the powers of s. 93, made in one of the promenades a convenience for urinals, &c., sunk to a depth of nine feet, and lighted by skylights level with the surface of the promenade:—

Held, that though the promenade was a "public place," still, as nothing had been dedicated to the public except the surface, the soil under the surface could not be considered part of a "public place" or "street" within the meaning of the Tunbridge Wells Improvement Act, 1890, and that the corporation were not entitled to erect the conveniences in question within such soil:

Held also, that the corporation could not justify their acts under ss. 39 and 149 of the Public Health Act, 1875, for assuming that the locus in quo was a street it was not a highway repairable by the inhabitants at large, and the property in the soil did not therefore vest in the corporation, but remained in the lord of the manor.

APPEAL by the plaintiffs from the judgment of Grantham, J. (who tried the case without a jury), dismissing the action.

At the trial it appeared that the action was brought by the plaintiffs, in whom the manor of Rustall was vested, for the purpose of compelling the defendants to remove, or at all events discontinue the use of, some lavatories, water-closets, and urinals which they had built under a public promenade at Tunbridge Wells known as the Pantiles. The defendants built these

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conveniences under the authority, or supposed authority, conferred upon them by s. 93 of the Tunbridge Wells Improvement Act, 1890. (1)

The structure complained of was a convenience for urinals and closets sunk to a depth of about nine feet, and lighted by flat skylights level with the surface of the promenade.

The promenade was within the manor of Rustall and had been part of the waste of the manor, and it was not disputed that (subject to the effect of the different statutes referred to in argument) the soil of the promenade was vested in the plaintiffs.

The defendants justified their proceedings under s. 93 of the Tunbridge Wells Improvement Act, 1890, and ss. 39 and 149 of the Public Health Act, 1875.

The plaintiffs alleged that these Acts did not apply—(1.) because of special legislation which had taken place in 1739; (2.) because the Pantiles was not a street or public place within the meaning of the Public Health Act, 1875, or the local Act of 1890.

Before 1739 Tunbridge Wells had become a fashionable place

(1) By the Tunbridge Wells Improvement Act, 1890, s. 93: "The corporation may erect and maintain or permit to be erected and maintained, in any street or public place, or on land belonging to them, or on land belonging to any person with the consent of the owner, lessee, and occupier thereof for the time being, water-closets, urinals, and lavatories for the use of the public, and may charge for the use of such water-closets and lavatories erected and maintained by them such sum as they may think proper, and the corporation may make bye-laws for the management of such water-closets, urinals, and lavatories, and for the conduct of the persons using the same. Every water-closet, urinal, or lavatory erected by permission of the corporation under this section shall be subject to such terms and conditions as the corporation may prescribe with respect to the charges, if any, to be made for the use thereof and for repairing and keeping the same in proper order and for closing or removing the same if and when required by the corporation, but nothing herein shall be held to authorize a charge for the use of a public urinal."

Sect. 284 enabled the corporation to erect and maintain shelters, bandstands, lavatories, and other places and conveniences with the consent of the owner and occupier on any land within the borough "or on any other land within the borough now or hereafter belonging to the corporation or under their control, and for the purposes of this section the corporation may by agreement acquire and hold any land within the borough not exceeding in the whole five acres."

of resort partly on account of its medicinal springs, and the Pantiles had been laid out as a promenade ever since 1638 for the use of visitors upon land which was part of the waste of the manor. Certain houses had been built on the northern and southern sides of the walks, and disputes had arisen between the lord of the manor and some of the freehold tenants. Ultimately an agreement, dated November 21, 1739, was entered into between the lord and the freehold tenants, which recited that disputes had long subsisted between the lord and the tenants as to the inclosing of the medicinal springs called Tunbridge Wells, and of the Tunbridge Wells Walks, and also concerning the erection of messuages, shops, and other buildings near to the said walks, which were alleged by the tenants to form part of the waste of the manor, whereby their common of pasture and other rights in the waste were interfered with, and that to determine and adjust these disputes the present agreement was come to between the parties. By this agreement it was provided that the messuages, shops, and buildings in dispute should be partitioned between the lord and the tenants in the way therein mentioned. It was further agreed by clause 5 that the lord and the freehold tenants and their respective heirs and assigns should for ever thereafter "permit and suffer the said medicinal springs or wells of water called Tunbridge Wells, the place or shed near the said spring or wells called Dippers Hall, and the walks called Tunbridge Wells Walks, and all ways, passages, and open pieces of ground part of the said premises or leading thereto, to remain always open and free for the public use and benefit of the nobility and gentry and other persons resorting to or frequenting Tunbridge Wells in the manner the same now are or lately have been used." That neither the lord nor the freehold tenants should at any time thereafter build any messuage upon any part of the premises than those then built upon, or enlarge any of the existing foundations. That the lord and the tenants from their respective messuages might make sewers to the brook "so as such sewers do not in any respect injure or prejudice the said medicinal springs or wells of water, to prevent which it is hereby further agreed that no sewer be made nearer to the springs or wells than 30 feet." "Also, it is hereby further agreed by and

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between the parties hereto that no necessary or bog-house shall be made in any part of the premises before mentioned," but the existing ones might continue; and no cellar was to be sunk more than 6 ft. 1 in. lower than the surface of the upper walk.

This agreement was confirmed by an Act of 1739, which recited it in full, and stated: "Whereas it would be for the advantage of all the parties interested in the premises that the said agreement should be carried into execution, in regard that the great expenses which would necessarily attend the further prosecution of the suits that have arisen and are still depending between the parties will thereby be prevented, but such agreement cannot be rendered effectual to answer the intention of all the parties without the aid of an Act of Parliament for the advantage of all the parties interested in the premises." The Act then proceeded to "ratify, establish, and confirm" the agreement, and the saving clause shewed that it was to be binding on the lord and on all freehold tenants of the manor and all persons claiming rights of common.

At the time of this agreement and Act the upper walk was rather higher than the lower walk, and the lower walk was slightly raised above the road below it, which was a carriage-road giving access to the Coach and Horses Inn.

In 1793, with the consent of the lord and by the aid of subscriptions, the level of the lower walk was raised to that of the upper walk, and a slope was formed between this and the road, which slope was inclosed by a railing and was planted with trees.

In 1835 an Act was passed by which Improvement Commissioners were established for the town of Tunbridge Wells, which Act was modified by an Act of 1846. In 1848 these commissioners became the sanitary authority. In 1875, when the Public Health Act was passed, they became the urban sanitary authority. In 1888, with the consent of the lord of the manor, the slope between what had been the lower walk and the road was done away with by the local authority, and a retaining wall was built which encroached about two feet upon the road, and the walk was made level to the edge of this wall, which was surmounted by an iron railing. Steps at intervals gave access

to the road below. The public from that time passed over this raised part on foot, as they did over the rest of the Pantiles.

In 1876 some correspondence took place between the lord's agent and the town authorities in which they, proposing to do some repairs on the walks with the lord's consent, inquired whether he intended to raise any question as to the right of the public over the walks, because they had no power to spend the rates on property claimed as private. The lord's agent answered that the lord did not question the rights of the public over the parade, but that as it was within the manor, he was entitled to be consulted as to any alterations. He, however, intimated that they were at liberty to do repairs without any application to him. In 1889 a Royal Charter was obtained incorporating the district into a municipal borough.

In 1890 the Tunbridge Wells Improvement Act, 1890, was passed; but neither this nor any other of the local Acts contained any repeal of the Act of 1739, or any express power to interfere with the well or the walks.

Sir R. E. Webster, Q.C., Moulton, Q.C., and *Warrington*, for the plaintiffs. The defendants claim to justify what they have done by the Tunbridge Wells Improvement Act, 1890, s. 93; but this section gives them no power to interfere with the subsoil of the waste of the manor. The dedication of these promenades to the public was on the terms of the Act of 1739, which relates only to the surface, and the Act is equivalent to a statutory declaration that the Pantiles shall be dealt with to all time in manner provided by the Act—a special provision which cannot be overridden by a general Act. The learned judge put a wrong construction on the correspondence of 1876: there is no trace in it of an intention by the lord to give up any of his rights. The Metropolis Local Management Act, 1855, ss. 88, 96, gave powers to make urinals; but it was thought necessary in the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 44, to give an express power to deal with the subsoil. The judgment of the Master of the Rolls in *Coverdale* v. *Charlton* (1), under the Public Health Act, 1875, is relied upon, but it does not help the case.

(1) 4 Q. B. D. 104.

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The ownership of the soil of the promenades in question is in the lord of the manor, subject only to the rights of the freehold tenants and the right of the public to use the land in the way in which they had used it before the Act of 1739. The Public Health Act, 1875, does not vest public streets in the local authority without regard to the mode in which they were dedicated to the public. If a street with cellars under it were dedicated to the public, the local authority would have no right in the cellars, and could not make a sewer through them: *Rolls* v. *Vestry of St. George the Martyr, Southwark.* (1) The Public Health Act, 1875, s. 149, only vests in the urban authority streets repairable by the public at large. The Pantiles were not repairable by the public: the urban authority only had permission from the lord to repair them; so they never vested in the defendants at all. The Tunbridge Wells Act, 1890, has the same definition of "street" as the Public Health Act, 1875.

Sir H. James, Q.C., and *Upjohn*, for the defendants. The first question is whether the locus in quo can be considered as a "street." Apart from the Act of 1739, it unquestionably would have vested in the local authority. It has been argued that it was not a street because it was given to the public under that Act, and not in the ordinary way of dedication. But that Act merely provides that as between the lord of the manor and the freeholders a certain agreement shall be binding. The Act recites that it will be "for the advantage of all the parties interested in the premises" that the agreement should be carried into execution; there is not a word about the benefit of the public. The argument of the plaintiffs proceeds on the ground that there has been only a partial dedication of the land to the public. But if the land becomes a street there is by force of the statutes a dedication which no private agreement can vary. "Street" is defined by s. 4 of the Public Health Act, 1875, and the soil of this land comes within the definition: *Coverdale* v. *Charlton.* (2) Then s. 149 vests all streets in the urban authority. The urban authority applied to the lord of the manor and said they could not spend public money on the land unless it was admitted to be a public highway, and from that time they have

(1) 14 Ch. D. 785. (2) 4 Q. B. D. 104.

done the repairs. Accordingly there has been, in fact, a dedication to the public. In *Wandsworth Board of Works* v. *United Telephone Company* (1) Lord Esher approves of Lord Bramwell's definition of "street," "A surface of such thickness as the local board may require for the purpose of doing to the street what is necessary for it as a street, and also of doing those things which are commonly done in and under the streets"; and in the case of *Fareham Local Board* (2) the same definition is adopted. The Public Health Act, 1875, s. 39, authorizes every urban authority to provide urinals.

[KAY, L.J. The argument from that section would be cogent if the Act had authorized their being made underground.]

The legislature can never have intended to require such structures in all cases to be made above ground. Sect. 93 of the Act of 1890 says the corporation may erect urinals "in any street or public place," not merely in streets vested in them. "In" a street imports "on or under." Even if the word used had been "on" the corporation were not precluded from going below the surface. The word must receive a reasonable construction according to the nature of the thing to be done. Then, as to the effect of the agreement of 1739, it could only bind the lord and the tenants, not the corporation, who were not incorporated until 1889, and are therefore outside the Act by which that agreement was confirmed.

Sir R. E. Webster, Q.C., in reply, referred, as to the limitation to be placed on the word "street," to *Mayor, &c., of Portsmouth* v. *Smith.* (3)

Upjohn also referred, as to the meaning of the word "street," to *Jowett* v. *Local Board of Idle* (4) and *Fenwick* v. *Rural Sanitary Authority of the Croydon Union.* (5)

Cur. adv. vult.

March 20. LINDLEY, L.J. (after stating the object of the action, and reading s. 93 of the Tunbridge Wells Improvement Act, 1890, proceeded as follows):—

The plaintiffs are the lords of the manor of Rustall, and the soil of the locus in quo is their property. The surface of that soil is

(1) 13 Q. B. D. 904.
(2) 7 Times L. R. 443; Sol. J. April 25th, 1891, p. 431.
(3) 10 App. Cas. 364, 375.
(4) W. N. (1888) 87.
(5) [1891] 2 Q. B. 216.

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a public promenade, which was enlarged, and in substance made, some years ago by the local authority with the consent of the lord of the manor. The correspondence which took place when this was done, and the evidence given at the trial, convince me that, assuming the locus in quo to be a street or public place, it has not become repairable by the inhabitants at large, and is not, therefore, vested in the defendants by the Public Health Act, 1875, nor, indeed, by any other Act. Nor does the evidence warrant the inference that the plaintiffs are estopped from denying that it is so vested. The defendants had, therefore, no right to erect the lavatories, &c., where they did as owners of the soil in which they were put. The soil belonged to the plaintiffs, and the defendants can only justify their proceedings under the section which I have read.

Is, then, the locus in quo a "street or public place" within the meaning of that Act? The promenade itself—i.e., the surface of the ground in question—is certainly a "public place," even if it is not a "street" within the meaning of s. 4 of the Public Health Act, 1875. But nothing has been dedicated to the public except the surface, and, after much consideration, I have come to the conclusion that the soil under the surface, not having been dedicated to the public, is not a "street or public place" within s. 93 of the local Act, and that the defendants had no right, therefore, to erect the lavatories, &c., in that soil without the consent of the plaintiffs under that section. For the same reason I have come to the conclusion that the soil in which the lavatories, &c., have been erected was not under the control of the defendants so as to enable them to justify their acts under s. 284 of the local Act. The case of *Re Fareham Local Board* (1) is not opposed to this view, for the wires protected there were the property of the local board and were attached to posts belonging to them, and erected in the street which was vested in them, and which included the soil in which the posts were erected.

The word "street" in the Public Health Act has been decided to mean a corporeal hereditament consisting of the surface soil itself (see *Coverdale* v. *Charlton* (2) to such a depth as is required

7 Times L. R. 443. (2) 4 Q. B. D. 104.

for the purposes of traffic: see *Rolls* v. *Vestry, &c., of Southwark.* (1) But it was held in *Wandsworth Board of Works* v. *United Telephone Co.* (2) that "street" did not include the space so far above the surface as not to interfere with traffic. Upon the same principle it appears to me that ground well below the made road or pavement is not a "street" within the meaning of the same Act. If it be said that the ground below is wanted for support, the answer is, that so long as the road is supported the public have no right to or interest in the soil below.

The expression "public place" does not, in my opinion, express more than the word "street" so far as soil below the surface is concerned.

This view of the construction and effect of the Tunbridge Wells Improvement Act, 1890, renders it unnecessary to consider its effect on the special Act of 1739 giving effect to the agreement between the lord of the manor and the commoners recited in that Act. It is sufficient to say that there is nothing in the Act of 1739 which assists the defendants. But that Act does, in my opinion, confirm the view that I have taken of the limited meaning of "street" in s. 93 of the local Act of 1890.

It only remains to consider to what relief the plaintiffs are entitled. An injunction was not seriously pressed for, and there is no necessity for granting an injunction, at least at present. But the plaintiffs are, in my opinion, entitled to have the judgment appealed from reversed, and to a declaration that they are entitled to the soil in which the lavatories, &c., have been erected, and that the defendants are not entitled to them, or to the use of them, without the consent of the plaintiffs. Liberty to apply should be reserved. The defendants, being in the wrong, must be ordered to pay the costs here and below.

KAY, L.J. (after stating the facts of the case down to and inclusive of the Act of 1890, proceeded as follows):—

It is argued on behalf of the corporation that these walks are streets, or that at any rate they are a public place, and that s. 93 empowered the corporation to make this convenience. The Act

(1) 14 Ch. D. 785. (2) 13 Q. B. D. 904.

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of 1739, it is urged, is a mere parliamentary sanction to a contract between the lord of the manor and the freehold tenants, which could not be made binding without parliamentary authority.

By s. 4 of the Public Health Act, 1875, "street" in that Act includes amongst other things "any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not;" and by s. 149, when it is a "highway repairable by the inhabitants at large within any urban district," such street "and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority." In *Coverdale* v. *Charlton* (1) it was held that these words did not give the property in the soil under the street, but merely the surface and such part of the soil as could be used for the ordinary purposes of a street. In *Rolls* v. *Vestry of St. George* (2) this was explained to mean only the surface, "and with the surface such right below the surface as was essential to the maintenance and occupation and exclusive possession of the street, and the making and maintaining the street for the use of the public." In *Wandsworth Board of Works* v. *United Telephone Co.* (3) Lord Esher, adopting the words of Lord Bramwell, that "street" comprehends "a surface of such thickness as the local board may require for the purpose of doing to the street what is necessary for it as a street, and also of doing those things which are commonly done in and under the streets," says that "street" comprises a depth which enables the urban authority to raise the street or lay down sewers. Bowen, L.J., does not go so far, and seems to hold that only a statutory right of property was intended to vest.

But I am clearly of opinion that these walks are not repairable by the inhabitants at large, although with the consent of the lord of the manor certain repairs have been done upon them by the urban authority; therefore they are not vested in the urban authority. Further, although it is not necessary to decide the point, my opinion is that the walks are a pleasure-ground set

(1) 4 Q. B. D. 104. (2) 14 Ch. D. 785, at p. 796.
(3) 13 Q. B. D. 904, at p. 913.

apart as described in the agreement and statute of 1739, together with the wells or medicinal springs, for the public use and benefit, in the manner in which the same were then used. The definition of street in the Public Health Act, 1875, s. 4, is wide, as I have pointed out; but, looking to the nature of these walks and the dedication shewn by the Act of 1739, I do not think these walks are within it. In my opinion a pleasure-ground, though within a town, is not necessarily a street. It would be absurd to say that Hyde Park is a street, even if the Crown had no rights in it.

Whatever rights the corporation of Tunbridge Wells may have must, I think, depend upon s. 93 of their Act of 1890. There is nothing in this statute which vests in them the soil under the walks. Assuming that the words "public place" includes the walks, I should be of opinion that the section would permit them to place a convenience upon the walks, but not underneath them.

There is no evidence that at the time when this Act was passed it was usual to make such constructions underground.

The statute of 1739 had a larger effect than merely confirming the agreement recited in it. An agreement between several persons may be revoked by assent of all the parties to it or their successors. But one effect of this statute was to make this agreement irrevocable. Another and for the present purpose more important effect was to give the sanction of an Act of Parliament to the peculiar dedication to the use of the public of the medicinal wells and of the walks or pleasure-ground mentioned in the agreement. I have no doubt that the public suing by the Attorney General could after this statute have enforced the provisions in their favour, and obtained an injunction to restrain any interference with them. All the conditions of the dedication were sanctioned in like manner, and my opinion is that any attempt to erect a convenience on these walks might have been restrained by the public, suing by the Attorney General, as being contrary to the dedication which Parliament sanctioned by the Act of 1739.

By the ordinary rule of construing statutes the Act of 1890 must be read as not repealing or interfering with the statute of

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1739, to which it does not refer, if this does contain provisions in favour of the public. I am inclined to think that it does contain such provisions, and that the prohibition against erecting conveniences in the walks is one of them. But if this be not so, at least the agreement and Act of 1739 contain a description and limitation of the dedication for public use of the wells and walks, and, this being so, I cannot read s. 94 as including these walks in the public places mentioned in that section. Even if they are included, I cannot see that the corporation had any right to make a convenience beneath the walks in the subsoil, which undoubtedly belongs to the plaintiffs. I think there should be a declaration that the corporation had no such right, but I am not inclined to interfere by injunction.

A. L. SMITH, L.J. This is an action brought by the plaintiffs in whom the manor of Rustall is vested to restrain the defendants from maintaining underground conveniences constructed by them under the Pantiles at Tunbridge Wells. Grantham, J., found for the defendants, and the plaintiffs appeal.

The action was originally launched upon two grounds—first, that the conveniences constituted a nuisance; and secondly, that they had been constructed by the defendants upon the plaintiffs' property without justification.

The first ground has been abandoned, and the cause has proceeded upon the allegation that the defendants have trespassed upon the plaintiffs' property.

It is not disputed that the place where the conveniences are erected was the plaintiffs' property; but the defendants justify under the Public Health Act, 1875, ss. 39, 149, and also under s. 93 of the Tunbridge Wells Improvement Act, 1890 (33 & 34 Vict. c. ccxxxv.).

To these defences the plaintiffs reply that neither the Public Health Act of 1875 nor the Tunbridge Wells Act of 1890 apply, because of the special legislation which took place in the year 1739; and secondly, because the place in which the conveniences are situated is not a street or public place within the meaning of the Acts of 1875 or 1890.

It becomes necessary, therefore, first of all to see what this

legislation was. [The Lord Justice stated the material parts of the agreement of 1739, and proceeded:—]

It appears to me obvious that this is an agreement come to for the mutual benefit of the lord and the tenants inter se, and nothing more. It is simply an agreement to settle the disputes which had long subsisted between them, and to determine what should or should not be done by the respective parties in relation thereto in the future. It is a mistake to say, as it was said by the appellants, that it was an agreement entered into by the lord and the tenants for the benefit of the public. That was not its object at all. Clause 5, which was so much pressed upon us when read in conjunction with the recital, that the object was to put an end to the existing disputes between the lord and the tenants as to the inclosing of the springs and walks and as to the buildings already erected, does not appear to me to indicate that the agreement was come to for the purpose of benefiting the public, but for the purpose of mutually benefiting the parties thereto, the one having desired that the springs and walks should be inclosed, and the other desiring that they should be kept open.

That the freehold tenants would benefit by the springs and walks being kept open is obvious, for this would naturally attract strangers to their town and enhance their trade, and this is the real object they had in view. But it was argued that as parliament in the year 1739 had passed an Act which "ratified, established, and confirmed" this agreement, it was to be taken as if the agreement was an Act of Parliament passed in the interests of the public, and that it became an Act of Parliament passed for a special purpose binding upon the whole world.

The object for passing the Act of 1739 is clearly stated in its preamble. It is therein recited: "Whereas it would be for the advantage of all the parties interested in the premises that the said ageement should be carried into execution, in regard that the great expenses which would necessarily attend the further prosecution of the suits that have arisen and are still depending between the parties will thereby be prevented, but such agreement cannot be rendered effectual to answer the intention of all the parties without the aid of an Act of Parliament for the

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advantage of all the parties interested in the premises." Who are they? Obviously the lord and the tenants. They are the persons dealt with throughout the agreement—not the public who may or may not go to Tunbridge Wells.

As, however, the agreement is confirmed by statute and is made irrevocable, it may be that the agreement and statute have conferred rights on the public to use the Pantiles and to take water from the springs, and it may be that these rights could be enforced by an information by the Attorney General; but I do not desire to be taken as deciding this point. But even if this be so, the Act of Parliament cannot be regarded as a statutory enactment conferring special rights on the lord of the manor or on the tenants, and exempting them from the provisions of subsequent general Acts conferring rights on other bodies. The rule that a special Act is not repealed by a subsequent general Act unless an intention to repeal it is expressed or is necessarily implied is laid down in numerous cases, of which *Hawkins* v. *Gathercole* (1), *Thorpe* v. *Adams* (2), and *Fitzgerald* v. *Champneys* (3) are good examples; but I am of opinion that the Act of 1739 is not a special Act within the meaning of this rule.

I pass now to consider the subsequent Acts referred to above. The first is the Public Health Act of 1875. Can the defendants justify under ss. 39 and 149 of this Act? This depends upon whether the locus in quo was a street which was a highway repairable by the inhabitants at large so as to vest the site where the conveniences have been erected in the defendants.

The facts are these. [The Lord Justice stated the alteration made in the walks in 1873, the correspondence between the lord and the local authority in 1876, and the particulars of the alteration made in 1888, and proceeded:—] Upon the top so levelled the public have since 1888 passed and repassed at their free will and pleasure on foot as over the other parts of the Pantiles. It appears to me that the top so levelled and used by the public on foot is a street within the meaning of the Public Health Act, 1875.

The interpretation section, viz., s. 4, enacts: "In this Act,

(1) 6 D. M. & G. 1. (2) Law Rep. 6 C. P. 125, 135.
(3) 30 L. J. (Ch.) 777, at p. 782.

if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them. 'Street' includes any road, lane, footway, square, court, alley, or passage whether a thoroughfare or not"; and *Taylor* v. *Corporation of Oldham* (1), approved of in this Court in the *Midland Ry. Co.* v. *Watton* (2), and again reaffirmed in this Court in *Hill* v. *Wallasey Local Board* (3), has decided that it is immaterial whether the road or footway be public or private property.

The question is not whether the local authority could make a sewer through the Pantiles. I should have thought that s. 16 of the Act of 1875 enabled them to do so, and that under s. 54 they could also have constructed water-mains: see the case of *Hill* v. *Wallasey Board of Works* (3); but I feel great difficulty in saying that they could not. The suggestion made that the local authority might thereby destroy the springs has no weight with me, for such a body would be the last to do anything of the kind so as to destroy the valuable amenity to their town. But by the Act of 1875 the local authority have no similar powers when they desire to provide and maintain the conveniences mentioned in s. 39; and unless they have property of their own whereon to erect them they cannot do so under that Act.

Is, then, the site upon which the local authority have placed the conveniences complained of a street which is a highway repairable by the inhabitants at large? For if not, the locus in quo is not vested in them, but still remains the property of the plaintiffs. It appears to me that it is not. The evidence leads me to the conclusion that it was not a highway repairable by the inhabitants at large, at any rate, up to June, 1876; and I can find no indication that since that date any of the formalities required by the Highway Act of 1835 before liability to repair can be cast upon the public have been fulfilled. Nor do I find that the local authority have given the notice prescribed by s. 152 of the Act of 1875, or by s. 63 of the Act of 1890, which is the same thing, to constitute it a highway repairable by the

(1) 4 Ch. D. 395. (2) 17 Q. B. D. 30.
(3) [1894] 1 Ch. 133.

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inhabitants at large. It is not, therefore, a street which is a highway repairable by the inhabitants at large.

But it was said, that even if this were so, the plaintiffs were estopped from denying that it was such a highway because of of what took place in June, 1876, and subsequently in October, 1888. But is this so? All that the lord of the manor permitted in June, 1876, was that the local authority might repair the Pantiles, if they desired to do so, without asking his leave, expressly reserving all his other rights in the locus in quo. It seems to me that the inference ought not to be drawn that he consented to the locus becoming a highway repairable by the inhabitants at large, so as to divest him of his property therein. It was clearly not the intention of the parties, and I do not draw this inference. In October, 1888, he undoubtedly consented to the retaining wall and other works being executed by the corporation; but it is quite consistent with this that he was willing that the public should have rights of passage over the surface then constructed, as they had exercised from the earliest times over the rest of the Pantiles, but not that he should be divested of his property.

For these reasons, in my judgment, the defendants cannot justify under the Public Health Act of 1875.

I now come to the justification under s. 93 of the Tunbridge Wells Improvement Act, 1890. This Act does not incorporate, but is in addition to the Public Health Act of 1875. In some instances the powers given to the local authority by the Act of 1890 overlap those given by the Public Health Act of 1875, and in many instances the Act of 1890 gives powers to the local authority in addition to what is given by the Act of 1875, and this s. 93 is an example of such additional powers given to the local authority. [The Lord Justice read that section.] This power to erect these conveniences in any street or public place was new, and is in addition to any power to be found in the Public Health Act of 1875. By referring to s. 4 of the Act of 1890, it will be seen that the word "street" therein is to have the same meaning as in the Public Health Act, 1875, except in certain cases not material to this case.

If, then, the question had been whether the local authority

could have erected the conveniences complained of upon the surface of the Pantiles, which for the reasons above given in my judgment is a street within the meaning of the Act of 1890, and also, it seems to me, a "public place," my answer would have been "Yes," for the simple reason that the statute says they may.

But now arises the point, Does the statute enact that the local authority can do so below the surface on land which is not their property? These conveniences reach down nine feet under the surface, two feet of which are embedded in soil below that which was tipped in 1888 by the corporation behind the retaining wall.

The cases of *Coverdale* v. *Charlton* (1), *Rolls* v. *Vestry of St. George the Martyr, Southwark* (2), *Wandsworth Board of Works* v. *United Telephone Co.* (3), and *Fareham Local Board* v. *Smith* (4) were referred to in the argument to shew how much of the surface and subsoil of a street vests in a local authority; but I would point out these were all cases in which it was admitted that the streets had vested in the local authority; whereas in the Act of 1890 I can find no clause which vests any of the streets in the local authority, excepting s. 43, which has no application to the present case; and as the Pantiles are not highways repairable by the inhabitants at large, they in no way vest in the corporation. These cases have, therefore, no application.

The question comes to this: Is a corporation, which is empowered to erect conveniences in any street or public place, or on land belonging to them, and charge for their use, entitled to erect the same under a street or public place on land which does not belong to them? A landowner, when he dedicates his land to the public to pass and re-pass over it, dedicates the surface and no more for the public to use as a way. All that is below the surface he still retains to himself as before, and unless there is some statutory enactment vesting the way in somebody else, the landowner is just as much *owner* of the soil of the way and all below it as he was before he dedicated it, subject only to the right which he has granted to the public to use its surface as a way.

(1) 4 Q. B. D. 104.
(2) 14 Ch. D. 785.
(3) 13 Q. B. D. 904.
(4) 7 Times L. R. 443.

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Now, when a statute enacts that a corporation may erect a building in a street over which they have only a right of way as one of the public, what does that mean? Does it mean that they not only may utilize what the landowner has already dedicated to the public, or does it mean that they may take away from the landowner what he has not dedicated to the public, and which still remains his own? It seems to me that the true answer is that it only entitles the corporation to use what the owner has dedicated to the public, and it does not entitle the corporation to take the landowner's land for nothing; and I should point out, if the corporation desire to erect buildings upon another man's lands, they can do so by paying for it, for the Lands Clauses Consolidation Acts are incorporated in the Act of 1890, and that Act can be brought into play.

It was said that to place a sewer in a street would certainly mean under a street, and in this I agree; but I must point out that without the special powers given to a corporation they could not place a sewer in a street which has not vested in them. Moreover, the words are "*erect* in a street," which rather points to building upon the surface and not underground.

At the time when the Act of 1890 was passed it does not seem that the conveniences were ordinarily placed underground, though, since that date, it has become a common practice to do so, and by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 44, power is given to a sanitary authority to provide public conveniences, and the subsoil of the road, exclusive of the footway adjoining any building, is therein expressly vested in the authority for that purpose.

I therefore come to the conclusion that the defendants cannot justify, under the Act of 1890, the erection of these conveniences underground in land which has never vested in them, and I agree with Lindley, L.J., in the judgment which should be entered in this case, and that the appeal must be allowed.

Appeal allowed.

Solicitors: *Burn & Berridge; Sole, Turner, & Knight.*

H. C. J.

[IN THE COURT OF APPEAL.]

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Guarantee—Indemnity—Surety—Oral Promise—Promise to answer for Debt or Default of another—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

A promise by the defendant in consideration of the plaintiff accepting certain bills of exchange, to indemnify him from liability to make payments in respect of such bills is not within s. 4 of the Statute of Frauds.

The defendant orally promised the plaintiff that, if he, the plaintiff, would accept certain bills for a firm in which the defendant's son was a partner, he, the defendant, would provide the plaintiff with funds to meet the bills:—

Held (affirming the judgment of Mathew, J.), that this was a promise of indemnity and not of guarantee, and therefore not required by s. 4 of the Statute of Frauds to be in writing.

Thomas v. *Cook* (8 B. & C. 728) and *Wildes* v. *Dudlow* (Law Rep. 19 Eq. 198) approved of and followed.

MOTION for new trial.

The plaintiffs were a firm of merchants in London, William Binney being the present sole member of the firm, and accordingly the real plaintiff in the action. He is therefore referred to as "the plaintiff" throughout this report.

In 1887 the defendant, Julius Conrad, a member of a firm of merchants carrying on business in London and Demerara, introduced to the plaintiff the name of the firm of Wakefield & Watson, who carried on the business of dealers in bread-stuffs in Demerara, and asked the plaintiff to extend to that firm a bill-credit of 2000*l.* This the plaintiff orally agreed to do at a commission of 1 per cent. Early in 1888 the defendant's son was admitted into the Demerara firm, which then became Conrad, Wakefield & Co.

On June 27, 1888, the defendant wrote to the plaintiff's firm as follows: "Messrs. William Guild & Co.—Dear Sirs,—In consideration of your increasing the drawing credit on yourselves now existing in favour of Messrs. Conrad, Wakefield & Co. of Demerara from 2000*l.* to 5000*l.*, say, Five thousand pounds sterling, I hereby guarantee you the latter amount, and I also agree that, in the event of there being on any occasion want of cover for any of your acceptances of their drafts at time of

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maturity, I will place you in funds to retire the bill or bills either by my acceptance or otherwise."

The plaintiff wrote in reply accepting these terms, and matters proceeded on that footing till March, 1891, when, at an interview between the plaintiff and the defendant, the plaintiff orally agreed with the defendant to increase the bill-credit to the Demerara firm to 10,000*l.*, upon the defendant increasing his guarantee to 6000*l.*

In December, 1891, the plaintiff declined to go on taking up the bills of Conrad, Wakefield & Co., as they had already exceeded the limit of their credit by 4000*l.*; and in particular the plaintiff declined to take up a batch of Conrad, Wakefield & Co's. bills for 5950*l.* which were about to become due.

On December 31, 1891, an interview took place between the plaintiff, the defendant, and Wakefield, a member of the Demerara firm, with reference to these bills. According to the plaintiff's account, Wakefield explained that the overdrafts were attributable to his firm having made extensive purchases of bread-stuffs in Demerara which were payable in cash, and that the bread-stuffs were more than sufficient to cover the overdrafts. Upon the plaintiff declining to accept the bills on this explanation, the defendant said, "If you accept these bills I will guarantee them, and I will further guarantee to go out to Demerara and personally see that the proceeds of the bread-stuffs are remitted to you to cover. I will guarantee them with this proviso, that as the bread-stuffs may not be immediately realizable for cash, but we may be compelled to sell on a short credit, the bills will be required to be renewed, and you must therefore trust to me. I will just draw as little as I can." The plaintiff then asked the defendant to put this into writing; but the defendant declined to do so, saying, "Surely you know sufficient of me, and that my word is as good as my bond. I give you my word." Ultimately the plaintiff consented to these terms, and accepted the bills.

In January, 1892, a further interview took place between the same three parties with reference to a further batch of bills of Conrad, Wakefield & Co. for 5280*l.*, and the plaintiff accepted these bills also on, as he alleged, the defendant orally offering

his personal guarantee. The defendant, on the other hand, denied that he had given any such guarantee or undertaking, as alleged, to the plaintiff at either of these interviews.

Conrad, Wakefield & Co. being unable to meet the bills at maturity, and the plaintiff having therefore become liable upon them, he, in June, 1892, brought this action against the defendant to recover 17,230*l.*, namely, 5000*l.* under the written guarantee of June, 1888, 1000*l.* under the increased oral guarantee of March, 1891, 5950*l.* under the alleged oral undertaking of December, 1891, and 5280*l.* under the similar alleged undertaking of January, 1892.

In November, 1892, Wakefield was adjudicated bankrupt, and before the action came on for trial he died.

The action was tried before Mathew, J., and a special jury on May 2 and 3, 1894. The plaintiff and defendant were both examined and cross-examined. The jury having intimated, in the course of the trial, that they believed the plaintiff's account of what took place at the interviews of December, 1891, and January, 1892, the learned judge put to them the following questions: (1.) Was credit extended to 10,000*l.* in March, 1891? (2.) Did the defendant know of this extension and agree to increase the 5000*l.* guarantee to 6000*l.*? (3.) Did the defendant, in December, 1891, and January, 1892, undertake to provide funds to meet the two batches of bills for 5950*l.* and 5280*l.* respectively?

The jury answered all these questions in the affirmative. The parties then agreed that the jury should be discharged, and that all other questions in the case, whether of fact or law, should be dealt with by the judge alone; and the case was thereupon adjourned for argument upon the question whether s. 4 of the Statute of Frauds applied to all or any of the oral undertakings. This question was accordingly argued on May 7, when Mathew, J., held that the extension of the guarantee by 1000*l.* in March, 1891, ought to have been in writing, as it was an extension of a document which bound the defendant to be responsible for the default of the Demerara firm; but he held that the oral undertakings at the interviews in December, 1891, and January, 1892, were not guarantees, and were not within the

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requirement of the statute. With reference to what took place at those two interviews, the learned judge said: "It is said that the plaintiff described the transaction himself as a transaction of guarantee. I am not in the least disturbed by the use of that phrase. What was meant was that if he accepted the bills he should be placed in funds; and the jury have accepted that as the result of the transaction. . . . . It is said that this was a promise to answer for the debt, default, or miscarriages of another. I say not. It appears to me to be a promise to pay the holders of the bills at the time the bills became due. The Demerara firm was out of any arrangement upon the subject. Whether the Demerara firm had means, or would have means, was entirely a supposition at that time. It was not a contract to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay. The contract was to find funds to enable the plaintiff to meet these acceptances. That this is not a contract within the Statute of Frauds appears to me to be illustrated by *Castling* v. *Aubert* (1), *Eastwood* v. *Kenyon* (2), *Thomas* v. *Cook* (3), *Fitzgerald* v. *Dressler* (4), *Reader* v. *Kingham* (5), *Wildes* v. *Dudlow* (6), and *In re Bolton.* (7)" The learned judge then gave judgment for the plaintiff for 16,230*l.* and costs, and a verdict was entered accordingly.

The defendant now moved for a new trial or for judgment as to the two batches of bills for 5950*l.* and 5280*l.* respectively, on the ground that there was no evidence in support of the third question left by Mathew, J., to the jury, and that such question should not have been left to the jury; that the alleged promise upon which the plaintiff sued, namely, the promise by the defendant to find funds for those two batches of bills, was a guarantee, and should have been in writing, in accordance with the provisions of the Statute of Frauds; and that there was no evidence that the defendant ever promised to accept any liability in respect of any of the bills.

(1) 2 East, 324.
(2) 11 Ad. & E. 438.
(3) 8 B. & C. 728.
(4) 7 C. B. (N.S.) 374.
(5) 13 C. B. (N.S.) 344.
(6) Law Rep. 19 Eq. 198.
(7) W. N. (1892) 163; 8 Times L. R. 668.

1894. June 19, 21. *Herbert Reed, Q.C.*, and *J. F. P. Rawlinson*, for the defendant. The evidence proves that the promises made by the defendant in December, 1891, and January, 1892, even supposing the plaintiff's story is true, were not unconditional promises to indemnify the plaintiff in any event, but conditional promises to indemnify him against loss if default was made by Conrad, Wakefield & Co., who were to remain primarily liable. They were, therefore, guarantees, and were promises "to answer for the debt, default, or miscarriages of another person," within the meaning of s. 4 of the Statute of Frauds (29 Car. 2, c. 3), and, therefore, required to be in writing. The test of a promise being a guarantee within the statute has always been held to be that it leaves the original debtor primarily liable, and makes the guarantor liable in case of his default only. In the present case there is no question that the firm was still primarily liable, and that the defendant intended only to be liable in case of their default: *Forth* v. *Stanton* (1); *Green* v. *Cresswell.* (2) With respect to the written guarantee for 5000*l.*, it may be conceded that it was originally binding; but the defendant has been released from his suretyship by the plaintiff allowing the firm to run further into debt without giving notice to the defendant. By doing so he put the defendant in a different position and increased his risk: *Holme* v. *Brunskill.* (3) Moreover, the plaintiff has lost his right of recovering against the defendant by proving for his debt in the bankruptcy of the firm in a foreign country: *Philips* v. *Allan.* (4)

Robson, Q.C., and *Scrutton*, for the plaintiff. The promises to meet the bills for 5920*l.* and 5280*l.* were not guarantees, but absolute promises to indemnify the plaintiff if he made himself liable by accepting the bills. Therefore, it was not necessary that they should be in writing under the Statute of Frauds: *Thomas* v. *Cook* (5); *Houlditch* v. *Milne* (6); *Fitzgerald* v. *Dressler* (7); *Reader* v. *Kingham* (8); *Eastwood* v. *Kenyon* (9);

(1) 1 Wms. Saund. 211 e.
(2) 10 Ad. & E. 453.
(3) 3 Q. B. D. 495.
(4) 8 B. & C. 477.
(5) 8 B. & C. 728.
(6) 3 Esp. 86.
(7) 7 C. B. (N.S.) 374.
(8) 13 C. B. (N.S.) 344.
(9) 11 Ad. & E. 438.

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Hargreaves v. *Parsons* (1); *In re Bolton* (2); *Wildes* v. *Dudlow* (3); *Hoyle* v. *Hoyle* (4); *Mountstephen* v. *Lakeman.* (5)

[LINDLEY, L.J., referred to *Sutton* v. *Grey.* (6)]

There was good consideration for the defendant giving the indemnity; for, although he was not himself a member of the firm of Conrad, Wakefield & Co., he was interested in its success, his son being a partner.

Reed, Q.C., in reply. The defendant relies on *Green* v. *Cresswell* (7), which is not overruled by *Reader* v. *Kingham* (8), and is still good law. *Thomas* v. *Cook* (9) was not followed either in *Green* v. *Cresswell* (7) or *Cripps* v. *Hartnoll.* (10)

[He also cited *Mallet* v. *Bateman* (11), *Anderson* v. *Hayman* (12), *Castling* v. *Aubert* (13), and *Sutton* v. *Grey.* (14)]

LINDLEY, L.J. This case is one of considerable difficulty and very near the line. The question is, what is the nature of the promise which the defendant made to the plaintiff. It appears that the real plaintiff, Mr. Binney, is a merchant who was in correspondence with a Demerara firm of Conrad, Wakefield & Co., one of the partners in which was a son of the defendant; and by a letter of June, 1888, the defendant agreed that, if the plaintiff would give credit to the Demerara firm to the extent of 5000*l.*, the defendant would indemnify the plaintiff to that extent. There is no question that that was a guarantee in the proper sense of the term; that is to say, it was an undertaking by the defendant to be responsible for the Demerara firm for 5000*l.* This was in writing; but by a verbal guarantee the amount was enlarged afterwards, in March, 1891, to 6000*l.* The plaintiff claimed that enlarged amount under this verbal guarantee; but the learned judge below has decided this claim

(1) 13 M. & W. 561, 570.
(2) W. N. (1892) 163; 8 Times L. R. 668.
(3) Law Rep. 19 Eq. 198.
(4) [1893] 1 Ch. 84.
(5) Law Rep. 5 Q. B. 613; 7 Q. B. 196; 7 E. & Ir. 17, 24–5.
(6) [1894] 1 Q. B. 285.
(7) 10 Ad. & E. 453.
(8) 13 C. B. (N.S.) 344.
(9) 8 B. & C. 728.
(10) 31 L. J. (N.S.) (Q.B.) 150; 2 B. & S. 697
(11) Law Rep. 1 C. P. 163.
(12) 1 H. Bl. 120.
(13) 2 East, 324.
(14) [1894] 1 Q. B. 285, 288–9.

in favour of the defendant, and no appeal has been brought in respect of that decision. As time went on, the Demerara firm got overdrawn; and at last, in December, 1891, the plaintiff was so reluctant to accept their bills that he eventually declined to do so; and an interview then took place between the plaintiff and defendant and Wakefield, a member of the Demerara firm. This interview took place on December 31, 1891, when bills of that firm for 5950*l.* were about to become due, but which the plaintiff would not accept; and in the following January a second interview took place in consequence of some further bills to the amount of 5280*l.* One of the difficult points in this case is to find out what took place at those interviews. The promises said to have been made were verbal only. Wakefield, one of the parties present at the interviews, is dead. The testimony of the plaintiff and the defendant upon the subject differ entirely. The plaintiff's version is to the effect that the defendant undertook to indemnify him against those bills if he, the plaintiff, would accept them. The defendant's version is that he did not give any such undertaking; and that was the controversy which was before the jury. The jury has decided that controversy in favour of the plaintiff. They have found, after hearing the evidence, that the defendant is wrong; that he did in fact make a promise to find the funds for both batches of bills, and to indemnify the plaintiff against them. I do not now consider the question of the form of the promise—whether it imposed a primary or a secondary liability: I pass that by for the moment. But the struggle on the main point resulted in favour of the plaintiff. The jury were then discharged, and it was arranged that any other questions which might arise in the case should be left to the judge. The judge then addressed his mind to the question whether the promise found by the jury to have been made by the defendant was in such a shape that the Statute of Frauds rendered it nugatory unless it was in writing, or whether it was such that the Statute of Frauds did not apply to it. The question whether that was brought before the jury seems a little uncertain. The learned judge, having seen the witnesses and read the correspondence, came to the conclusion that the promise was to the effect I will state presently. I will read the

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learned judge's own words. At the end of his judgment he says, the defendant's promise "was not a contract to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay. The contract was to find funds to enable the plaintiff to meet these acceptances." Now, whether the jury meant that or not is doubtful. The question is one of fact, and if it was not decided by the jury then it was left to the finding of the judge, and I have read what his finding was. Ought we to differ from that finding? We are urged to say that the judge was wrong in his finding; that the evidence did not come up to that; and that the defendant's promise was merely a contract to pay the plaintiff if the Demerara firm did not pay. That, in my opinion, is a difficult question. The evidence is loose unquestionably; but I cannot bring my mind to say that it cannot bear the construction which the learned judge put upon it. The nature of the promise is all-important: because, if it was a promise to pay if the Demerara firm did not pay, then it is void under the Statute of Frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the Statute of Frauds. I think that the learned judge has taken the true view, though it is very near the line. I cannot help thinking that the true result of those interviews was this—that the defendant did promise the plaintiff that, if he would accept those batches of bills, he, the defendant, would take care that they should be met, and that he himself would provide funds to meet them; and it was on the faith of that promise that the plaintiff accepted those bills. If this is the real contract, and if the learned judge is right in saying that the contract was not a contract to pay if the Demerara firm did not pay, but was a contract to pay in any event, then, in my opinion, the authorities shew that the Statute of Frauds does not apply. The authorities are *Thomas* v. *Cook* (1) and *Wildes* v. *Dudlow*. (2) *Thomas* v. *Cook* (1) appears to me to be undistinguishable from this case, if the facts here are such as I take them to be. There a man named Cook and a man named Morris had been in partnership; and on the dissolution of the partner-

(1) 8 B. & C. 728. (2) Law Rep. 19 Eq. 198.

ship it was agreed that Cook should pay the partnership debts, and it was also agreed that a bond of indemnity, executed by W. Cook, since deceased, and two other persons, should be given to Morris to save him harmless from the payment of those debts. It being necessary that two sureties should be found to join in the bond, the plaintiff agreed to become one of the sureties on a promise by the defendant to indemnify him, the plaintiff, from all liability by reason of his joining in the bond. The decision was as follows. After pointing out that Morris was a creditor, Bayley, J., said this: "Here the bond was given to Morris as the creditor; but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But it being necessary for W. Cook, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds." Then Parke, J., said: "This was not a promise to answer for the debt, default, or miscarriage of another person, but an original contract between these parties, that the plaintiffs should be indemnified against the bond. If the plaintiff, at the request of the defendant, had paid money to a third person, a promise to repay it need not have been in writing, and this case is in substance the same."

I need not refer to other cases which have followed that; but I must notice the argument which has been addressed to us that *Thomas* v. *Cook* (1) is bad law. Unquestionably it was not followed by the Court of Queen's Bench in *Green* v. *Cresswell* (2) and *Cripps* v. *Hartnoll* (3); but, notwithstanding the criticism of the learned judges in those cases, *Thomas* v. *Cook* (1) was set on its feet again by the decision of the Court of Exchequer Chamber in the latter case (4), and it has since held its ground; and after the decision in *Eastwood* v. *Kenyon* (5) it is impossible to hold that a promise made by the defendant to the

(1) 8 B. & C. 728.
(2) 10 Ad. & E. 453.
(3) 31 L. J. (N.S.) (Q.B.) 150; 2 B. & S. 697.
(4) 32 L. J. (N.S.) (Q.B.) 381; 4 B. & S. 414.
(5) 11 Ad. & E. 438.

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plaintiff to indemnify the plaintiff against a debt due from him to a third person is within the statute, and therefore required to be in writing. In my opinion the decision in *Thomas* v. *Cook* (1) was right, and it is treated as good law in *Hargreaves* v. *Parsons* (2), and it is supported in *Reader* v. *Kingham*. (3) The modern cases of *Wildes* v. *Dudlow* (4) and *In re Bolton* (5) are equally good law. Such being the case, it follows that the main defence here—namely, that the promise is bad as not being in writing within the Statute of Frauds—breaks down.

[The Lord Justice then dealt with certain other points urged on behalf of the appellant upon the facts of the case, and held that those points failed. The Lord Justice continued:—]

The main questions are, what was the promise? And, secondly, whether the promise was such as is required by the Statute of Frauds to be in writing. The promise is, in my opinion, clear; and the Court below has found that the promise was a promise to indemnify, and therefore not within the Statute of Frauds. That decision is, in my opinion, right, and therefore the appeal must be dismissed.

LOPES, L.J. The first question is, What was the promise which the defendant made to the plaintiff? And the second question is, Was that promise such that it was required, by s. 4 of the Statute of Frauds, to be in writing? The case turns upon whether—to put it shortly—the promise was a guarantee or an indemnity. Now, the evidence of the promise is verbal, and all that was left to the jury was whether the promise relied upon by the plaintiff was really made. The jury found in favour of the plaintiff on that point, and found that a promise was made by the defendant. Then it was understood that the character of the promise—whether it was a guarantee or an indemnity—should be determined by the judge. The judge subsequently had that question argued before him, and he determined it in favour of the plaintiff. He held that the promise was an indemnity and not a guarantee, and was therefore not within the

(1) 8 B. & C. 728.
(2) 13 M. & W. 561.
(3) 13 C. B. (N.S.) 344.
(4) Law Rep. 19 Eq. 198.
(5) W. N. (1892) 163; 8 Times L. R. 668.

Statute of Frauds. A promise to be liable for a debt conditionally on the principal debtor making default is a guarantee, and is a promise to make good the default of another within the statute. On the other hand, a promise to become liable for a debt whenever the person to whom the promise is made should become liable, is not a promise within the Statute of Frauds and need not be in writing. The question was one which, no doubt, it was difficult to decide. It appears to me that the evidence given at the trial as to the character of the promise is capable of either interpretation; and the question we have to determine is, was the learned judge wrong in putting upon it the interpretation which he did, namely, that it was not a contract to pay if the Demerara firm did not pay, but that it was a contract to find funds to enable the plaintiff to meet the acceptances? I am not prepared to say that he was. On the contrary, I am inclined to think he was right. The evidence amounts to this: the defendant says to the plaintiff, "I promise that if you accept these bills for which my son's firm will become liable I will indemnify you." That being so, *Thomas* v. *Cook* (1) applies, namely, that a promise to indemnify does not fall within the Statute of Frauds. That is also in accordance with *Reader* v. *Kingham* (2), which was referred to in *Wildes* v. *Dudlow*. (3) In the latter case it was held that where one person induces another to enter into an engagement by a promise to indemnify him against liability, that is not an agreement within the Statute of Frauds, and therefore does not require to be in writing. I have, accordingly, come to the conclusion that the construction which the learned judge put upon the promise in this case was not unreasonable, and that we ought not to interfere with this decision. With regard to the other points, they have been already dealt with by Lindley, L.J., and I have nothing to add. The appeal, therefore, fails.

DAVEY, L.J. I am of the same opinion.

The first question is, What was the promise made by the defendant to the plaintiff? The learned judge has found that

(1) 8 B. & C. 728. (2) 13 C. B. (N.S.) 344.
(3) Law Rep. 19 Eq. 198.

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it was a promise to keep the plaintiff indemnified against a liability on certain bills which he was asked by the defendant to accept, and that it was not a promise to pay in the event of some other person being in default. The jury found that the promise was made, and the learned judge put an interpretation upon that promise. We are now asked to say that the interpretation was erroneous; but I am not prepared to say that the learned judge was erroneous in his conclusion. If that is so, that answers the question we have to consider, because I agree with Lindley, L.J., in his view of the law. In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not. In my opinion this was a promise to indemnify, and therefore not within the statute; and the authorities entirely bear that out. In my opinion we must hold *Thomas* v. *Cook* (1) to have been rightly decided. That decision was held to be good law in *Hargreaves* v. *Parsons* (2) and *Wildes* v. *Dudlow* (3), and the present case appears to me to be undistinguishable in principle from those cases.

I am, therefore, of opinion that the judgment of the learned judge ought to be affirmed. Upon the other points I agree with what has been said by the other Lords Justices.

Appeal dismissed.

Solicitors: *Bannister & Reynolds; Parker, Garrett, & Parker.*

(1) 8 B. & C. 728. (2) 13 M. & W. 561.
(3) Law Rep. 19 Eq. 198.

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May 23, 24; *June* 2, 6; *Aug.* 10.

Maintenance of Suit—Action for Libel—Reflection on Character of Person other than Plaintiff—Right of such Person to maintain Plaintiff in his Action—Common Interest.

In an action for libel, brought against the proprietors of a newspaper in respect of the publication by them of an article reflecting upon the plaintiff's character, H., upon whose character the article also reflected, maintained the action by advising the plaintiff to commence it, and by employing his own solicitor to conduct it at H.'s sole expense. The action resulted in a verdict for the defendants therein, and thereupon they sued H. for maintenance, claiming as damages the costs they had incurred in defending the action for libel:—

Held, that H. was liable in the action for maintenance, because he had no common interest with the plaintiff in the action for libel, and was not, therefore, entitled to maintain the plaintiff in bringing and prosecuting that action.

ACTION, tried before Hawkins, J., without a jury, to recover damages alleged to have been suffered by the plaintiffs by reason of the unlawful maintenance by the defendants of a suit.

The following statement of the nature of the action, and of the facts proved at the trial, is taken from the judgment delivered by the learned judge.

This is an action of maintenance brought by the plaintiffs, the proprietors of a newspaper called the *Electrical Review*, against the defendant, Cornelius Bennett Harness, and the Electrical Battery Company, Limited, of which company Mr. Harness was, at the times after mentioned, the managing director. The Medical Battery Company was incorporated for the purpose of carrying out the treatment of diseases by means of electric and magnetic appliances. They manufactured and dealt in the apparatus suitable for such treatment; and, as a part of their establishment, they founded and maintained an institute called "The Electropathic and Zander Institute," with Mr. Harness as its head. In January, 1892, the plaintiffs published in the *Electrical Review* an article by way of protest against certain apparatus, contrivances, and electric belts, which had been publicly exhibited by the company at the Crystal Palace, as

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being constructed in direct opposition to the most elementary laws of electricity; and in July and September in the same year the plaintiffs published other articles highly disparaging to the institute, and to Mr. Harness its president. In respect of these publications the Medical Battery Company brought their action against the present plaintiffs on September 23, 1892. The pleadings in that action were completed, but no notice of trial was ever given, and on April 28, 1893, it was discontinued. On that same September 23, another article appeared in the *Electrical Review* commenting in very strong and adverse terms upon a report which had recently been written and published by Dr. Herbert Tibbits, testifying to the great value of the institute and the efficiency of its apparatus and appliances and of the Harness Electropathic Belt, and reflecting seriously upon the character and conduct of Dr. Tibbits in connection with that report, and also upon the Zander Institute and its appliances, and upon the conduct of Mr. Harness as its manager and the vendor of the belts bearing his name. In respect of this article, so far as it reflected upon his character and integrity, Dr. Tibbits on October 1, 1892, commenced an action of libel in his own name only against the now plaintiffs. That action came on for trial before Mathew, J., on February 15, 1893, and resulted in a verdict for the then defendants, on the ground of privileged criticism, with costs. Those costs Dr. Tibbits was unable to pay, and this action was subsequently brought against the now defendants (hereinafter called merely Mr. Harness), to recover such costs as damages sustained by the now plaintiffs, and incurred in defraying the expenses of their defence to Dr. Tibbits' action, upon the ground that the now defendants unlawfully maintained Dr. Tibbits in bringing and prosecuting his action. The maintenance charged consisted in Mr. Harness suggesting to Dr. Tibbits to commence his action, and in employing a solicitor, nominated by Mr. Harness himself, to issue the writ and conduct the case at his sole expense.

Lawson Walton, Q.C., J. E. Bankes, and *R. V. Bankes,* for the plaintiffs.

Jelf, Q.C., and *F. Dodd,* for the defendants.

Aug. 10. HAWKINS, J. (after stating the facts as set forth ante). I shall not think it necessary, after the full and exhaustive judgment of Lord Coleridge in *Bradlaugh* v. *Newdegate* (1), to occupy much time in considering what in law constitutes maintenance; because I do not understand Mr. Jelf, who argued for the defendant, Mr. Harness, to deny that the defendant did in fact maintain Dr. Tibbits in his suit; but he insisted that such maintenance was not unlawful or actionable, inasmuch as Mr. Harness had a common interest with Dr. Tibbits in bringing and prosecuting it; or, at least, honestly believed on reasonable grounds that he had such interest. Whether Mr. Harness had such interest or belief is the question I have to determine. In the solution of this question I have been much assisted by directing my careful attention to the definition of unlawful maintenance to be found in Co. Litt. 369 and Hawk. P. C. 7th ed. by Leach, vol. ii. c. 83. Lord Coke describes maintenance as, "when one maintaineth the one side without having any part of the thing in plea or suit." Hawkins describes it as, "where one officiously meddles in a suit depending in any such Court which no way belongs to him, by assisting either party with money or otherwise in the prosecution or defence of any such suit": see also *Anderson* v. *Radcliffe* (2) in the Exchequer Chamber. Hawkins also (s. 38) states the principle upon which the law against maintenance is based: "It seemeth that all maintenance is strictly prohibited by the common law as having a manifest tendency to oppression, by encouraging and assisting persons to persist in suits, which perhaps they would not venture to go on in upon their own bottoms." This principle is also stated by Lord Abinger, C.B., in *Prosser* v. *Edmonds* (3) thus: "That no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." There are, however, certain exemptions from the operation of the general law against maintenance: these are pointed out in Hawk. P. C. For the purposes of this case I need only refer to three of them, namely, exemptions in favour of certain neighbourly acts—of

(1) 11 Q. B. D. 1. (2) E. B. & E. 819, at p. 825.
(3) 1 Y. & C. 481, at p. 497.

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acts of charity—and of those persons who maintain suits in which they have a common interest. First, as to neighbourly acts. In s. 11 Hawkins says: "However it seems clear that a man is in no danger of being judged guilty of an act of maintenance for giving another friendly advice what action is proper for him to bring for the recovery of a certain debt . . . .; for it would be extremely hard to make such neighbourly acts of kindness, which seem rather commendable than blameworthy, to come under the notion of maintenance, which always seems to imply a contentious and over-busy intermeddling in other men's matters." But (s. 35) though one neighbour may assist another (as above), "he ought not to give him any money towards carrying on his suit." As to acts of charity, s. 26 states the exemption thus: "It seems to be agreed that anyone may lawfully give money to a poor man to enable him to carry on his suit"; and Lord Abinger, in *Findon* v. *Parker* (1), says (at p. 682): "If a man were to see a poor person in the street oppressed and abused, and without the means of obtaining redress, and furnished him with money, or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance:" see also *Harris* v. *Brisco.* (2). In connection with this ground of exemption, I may call attention to s. 30 of Hawkins which has reference to attorneys taking up the suits of poor persons. "It is certain," he says, "that they ought not to carry on a cause for another at their own expense, with a promise never to expect a repayment." To carry on a suit for another upon the mere speculation of obtaining costs from the defendant in the event of success, seems to fall directly within the mischief against which the law of maintenance is directed. In *Anderson* v. *Radcliffe* (3), Erle, J., said (at p. 818) that the statutes relating to champerty "were directed against speculations by attorneys in suits." It was not, however, and could not be, seriously suggested that the maintenance of Mr. Harness was at all due to neighbourly action, or to the impulse of a charitable spirit. I will proceed, therefore;

(1) 11 M. & W. 675. (2) 17 Q. B. D. 504.
(3) E. B. & E. 806.

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at once to the consideration of the question—whether Mr. Harness had, or upon reasonable grounds believed he had, a common interest with Dr. Tibbits in the result of his action. If this question be answered in the affirmative, Mr. Harness is undoubtedly entitled to have the verdict entered for him, but not otherwise. The sort of interest which will absolve a person from a charge of unlawful maintenance is well illustrated by Hawkins in the following sections:—In s. 13 it is said: "How far some acts of this kind are justifiable in respect of an interest in the thing in variance, . . . it seemeth to be clearly agreed that if a tenant in tail or for life be impleaded, he in remainder or reversion may lawfully maintain the defence of the suit with his own money," and that "if, in an action of trespass brought by or against a lessee for years, the inheritance come in question, the lessor may lawfully maintain his lessee; . . . for though the judgment which may be given against the lessee cannot directly bind his inheritance, yet the verdict may be a prejudice to his title, being given on a supposal of his not having a good one." So, again, in s. 17 it is said that those who have a bare contingency of such an interest in the lands in question, which possibly may never come in esse, may lawfully maintain another in an action concerning such lands. So, again, by s. 21 it is said, that if the maintainer has but a mere equitable interest in lands or goods, or even in a chose in action, he may lawfully maintain another in an action relating thereto; and a landlord may lawfully sue in the name of his tenant to try a right: see *Payne* v. *Rogers* (1); and, lastly, in s. 24 it is said, "also it seemeth to be agreed that wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit relating to the same." *Findon* v. *Parker* (2) is a good illustration of what constitutes common interest. In that case a number of owners of titheable lands in a certain parish having let their lands to various tenants, and such owners and tenants having received notices from the Principal, Fellows, &c., of Jesus College, Oxford, the tithe-owners, to set out their tithes in kind, held a meeting to discuss the advisability of resisting any suit

(1) 2 H. Bl. 350. (2) 11 M. & W. 675.

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brought against them, or any of them, to enforce obedience to these notices, the ground of resistance being that such tithes were not payable in kind inasmuch as they were covered by moduses. At the meeting it was stated that if one modus failed the whole must fail (see judgment of Rolfe, B., at p. 683). It was then agreed that the claims should be resisted, and the expenses incurred in defending any legal proceedings which might be instituted should be borne by the owners in proportion to the value of their estates. This was held not to be unlawful maintenance by Wightman, J., at nisi prius, and afterwards by the Court of Exchequer consisting of Lord Abinger, C.B., and Gurney and Rolfe, BB. In giving his judgment Lord Abinger said (at p. 681), as to the test of maintenance: "We ought to see whether there was any ground on which the parties making this agreement might reasonably suppose that they had a common interest in resisting the claim of the college." Later on (at p. 683) he added: "I proceed upon the ground that there was reasonable evidence of a common link of interest uniting the proprietors of the lands in question at the time they made the agreement." Rolfe, B., put the case thus (at p. 683): "It appears it was stated at the meeting, that if one modus failed the whole must fail. That, perhaps, was wrong; but if it was the bonâ fide opinion of the proprietors, and they thought it was something in the nature of a farm modus, and that it was apportioned in different shares among the different landowners of the district, and that they had a common interest in it, and having formed that opinion, they entered into this agreement, the only question on these pleadings is, was that or was it not a legal agreement?" I merely mention the following authorities —*Oliver* v. *Bakewell and Others* (1); *Stone* v. *Yea* (2); *Wild* v. *Hobson* (3)—as further illustrations of the same exemption. In each of those cases the persons charged with maintenance had an interest in the subject-matter of the suit. I find, however, no case in which a person has been held justified in maintaining a suit in which he was not interested in "the thing in variance," nor any in which such an exemption as that claimed in this case

(1) Gwillim on Tithes, vol. 4, 1381. (2) Jac. 426.
(3) 2 V. & B. 105.

has been even suggested. In the absence of any direct authority applicable to the case before me, I can but express the opinion I have formed after much consideration. In my judgment the common interest which will excuse maintenance must be an interest in the subject-matter of the suit—that which it is the object of the suit to obtain—or a common interest in the result of an issue raised in the suit. It must be something far beyond a mere wish for the success of the suit in the hope that it may indirectly benefit the maintainer; it must be more than a mere desire to do service to a friend, or that he may thereby acquire such control and influence over its conduct that he may turn it to his own advantage. All such hopes and expectancies would amount to nothing in the way of justification unless he had a real interest in the subject-matter of the suit, or "the thing in variance," or a material issue raised in it. If such hopes or expectancies without real interest in the subject-matter would suffice, maintenance would soon become very common. I am far from saying that the common interest of a maintainer must of necessity exist when the action is commenced; for I can well imagine a case in which, although the maintainer could when the suit was commenced have no common interest in the subject-matter of the suit—for instance, an action for an assault—yet in the course of the pleadings an issue might be raised in the determination of which he might have clearly a common interest to support or otherwise. I illustrate it thus: A sues B for a common assault. B pleads simply, not guilty. C would not be justified in maintaining A's action, because he could have no common interest in it. But, if B instead of pleading simply not guilty pleaded a justification that A was trespassing on his land and refused to go off it, and so he laid hands on him and put him off, and to this plea A replied that he was on B's land exercising a right of way common to himself and C, and issue were joined on this reply, this would be "a thing in variance," and C would, from the moment that issue was raised, clearly be justified in maintaining A's right, as being one in which he and A had a common interest.

Let me now deal with the present case. No doubt the article containing the libel complained of by Dr. Tibbits contained also

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libellous imputations upon the defendant, Harness, and his institution; but the libels upon the defendant, Harness, did not form any part of the cause of action; nor was there any issue raised as to his character or conduct. Harness' character and the worth of his appliances, it is true, might form, as they did in fact, prominent topics for counsel to comment upon adversely; and Harness might naturally feel deeply interested in the sense of being anxious to have such comment met and refuted, and the utility of his belts and appliances established before the world. This is the condition of many persons not parties to suits, whose characters and actions are unavoidably made the subject of very free comment during the progress of a cause; but this does not constitute such a common interest in the suit as to justify maintenance. In Tibbits' character or success, so far as he was concerned, Harness had no legal interest, and his own character and conduct could neither be judicially condemned nor justified. In no proper sense, therefore, could the libel on Mr. Harness be treated as the subject-matter of, or a matter in variance in, Tibbits' action. Tibbits' character alone was the subject-matter of that action, and his right to maintain that action was the sole matter in variance. The substantial defence was that the article was fair and bonâ fide comment and criticism of a published book and pamphlet, and of proceedings of public interest, and upon this defence alone the verdict passed for the defendants, the now plaintiffs. I know it may be said that it is hard that where a man's character is attacked he should not be allowed to support by his money the cause of another who, in defending his own character, will probably to some extent support that of the other who is attacked with him. It may be so. I can only say that, in my opinion, to allow a person to assist another in litigation upon matters which do not immediately and directly concern him, would lead to more strife and inconvenience than could possibly result from the present law—namely, that no man may intermeddle to support or defend a suit which, in the result and by the judgment in it, can finally determine nothing which he desires to have determined, or where that which he desires to have determined is not legally in issue in the suit. In the present case, however, I am pressed by no such feelings of hard-

ship; for in the action brought by the Medical Battery Company against Alabaster and others, to which I referred at the commencement of this judgment, the defendant, Harness, had a full opportunity of completely vindicating, not only the character of the company, but his own. He thought fit, however, to abandon that action; for he discontinued it on April 28, 1893—some months before Tibbits' action was tried—preferring to shelter himself under the wing of Tibbits; and, even in Tibbits' action, he did not do that which he might have done—namely, make himself co-plaintiff with Tibbits. Had he done so, he would have entitled himself to all the same advantages and opportunities of clearing his own character as he would have had if he had brought a separate action: see Order XVI., and *Booth* v. *Briscoe.* (1) This would have given him a common interest in the action, which, I think, he had not under the circumstances. This was not a case in which a joint action by Tibbits and Harness could have been maintained. Had it been so, perhaps each might have maintained the other. This was merely an action in which, two persons being libelled in one article, each might under Order XVI. separately have recovered damages as though he had brought a separate action; but, of course, if he had so joined as a plaintiff, he would have been liable to costs in the event of failure. By acting as he did, although he made himself liable for Tibbits' costs, Harness took the chance of any advantage he might derive in the action, but saved himself from liability to the defendants' costs in ordinary course. This action is brought to counteract such a course of conduct. I know that it is not necessary to establish that a joint interest in the action actually existed, it being sufficient to justify Harness in maintaining Tibbits' action, if on reasonable grounds he bonâ fide believed he had such interest—that is, that he reasonably believed in the existence of a state of things which, if true, would in law have justified him in maintaining the action. His erroneous belief as to what in law would justify him, and his bonâ fide belief in a state of things which would support his erroneous view of the law, would amount to nothing. I am of opinion that he had no such bonâ fide

(1) 2 Q. B. D. 496.

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belief as would afford him a justification; that if he had such belief he had no reasonable grounds for it; that he merely availed himself of Tibbits' action to save himself from the risk of liability to pay the costs of the defendants in that action, and that his conduct in all these respects was unlawful.

For all these reasons I think the verdict ought to be entered for the plaintiffs for the amount of the taxed costs of their defence, to be taxed as between party and party.

Judgment for the plaintiffs accordingly.

Solicitors for plaintiffs: *Lewis & Lewis.*
Solicitor for defendant: *Richard Furber.*

W. A.

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June 4.

THE WARDENS AND GOVERNORS OF CHOLMELEY SCHOOL, HIGHGATE *v.* SEWELL AND OTHERS.

Landlord and Tenant—Re-entry—Bankruptcy of Lessee—Relief of Underlessee against Forfeiture—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 2, 6—*Conveyancing and Law of Property Act,* 1892 (55 & 56 *Vict. c.* 13), *s.* 4.

The provisions of s. 4 of the Conveyancing and Law of Property Act, 1892, enabling the Court to grant relief to an underlessee upon forfeiture of the superior lease by the lessee, extend to cases in which the Court would have no power to grant relief to the lessee himself.

The conditions on which relief ought in such a case to be granted to the underlessee considered.

ACTION to recover possession of premises, together with apportioned rent and mesne profits, tried before Charles, J., without a jury.

In 1878 the plaintiffs had granted a lease of the premises to one Jonathan Jones for fifty years at a rent of 720*l.*; the lease contained a proviso for re-entry by the lessors if the lessee, his executors, administrators, or assigns, or any of them, should be adjudged bankrupt. By divers assignments the lessee's interest became ultimately vested in the defendant Sewell. The plaintiffs were parties to each mesne assignment, including that to Sewell, and the various assignees, including Sewell, entered into a separate covenant with the plaintiffs for the payment of the rent

reserved by the head lease and the performance of the lessee's covenants and conditions therein contained. On September 24, 1890, Sewell mortgaged the premises to the defendants W. & A. Nicholson by sub-demise for the residue of the term less the last day. On May 31, 1892, Messrs. Nicholson, the mortgagees, took possession of the premises, and they ultimately paid to the plaintiffs the rent for the quarter ending Midsummer, 1892. On July 19, 1892, Sewell was adjudicated a bankrupt, thus working a forfeiture of the lease; and on December 9, 1892, the present action was brought, the defendants being Sewell, his trustee in bankruptcy, Messrs. Nicholson, and Messrs. Flower, who were second mortgagees of Sewell; on January 16, 1893, judgment was signed against all the defendants except Messrs. Nicholson. On June 5, 1893, Sewell's trustee in bankruptcy disclaimed all interest in the lease. Prolonged but fruitless negotiations took place as to the terms upon which the property should be vested in Messrs. Nicholson, who shortly before the trial paid to the plaintiffs a further sum of money by way of rent or mesne profits without prejudice to their rights. In the present action Messrs. Nicholson claimed, under s. 4 of the Conveyancing and Law of Property Act, 1892, to be entitled to relief against the forfeiture by Sewell, and asked for an order vesting in them the property comprised in the lease for the whole unexpired residue of the term of fifty years (less the last day) upon such conditions as the Court might think fit. (1)

(1) By the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 2, power is given to the Court to grant to a lessee relief against the forfeiture of a lease for a breach of a covenant or condition in the lease; but by sub-s. 6 the section is not to extend to a condition for forfeiture on the bankruptcy of the lessee.

By the Conveyancing and Law of Property Act, 1892, s. 1: "(1.) The Conveyancing and Law of Property Act, 1881 . . . . and this Act shall be read together."

Sect. 4: "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the Court may, on application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as underlessee to any estate or interest in such property upon such conditions, as to execution of any deed or other

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Fischer, Q.C., and *W. Graham*, for the plaintiffs.

Whitehorne, Q.C., and *Bremner*, for the defendants.

The nature of the arguments upon the construction of the statute is sufficiently stated in the judgment.

CHARLES, J. [The learned judge, after stating the facts, proceeded:—] The effect of all these incidents is that I have now before me the plaintiffs, the lessors, on the one hand, and Messrs. Nicholson, the underlessees of Sewell, on the other, and no one else; and I am asked to declare that the plaintiffs are entitled to possession of the premises and also to compensation, either by way of rent or mesne profits, up to the delivery over of possession. No question is raised as to the liability of these defendants to pay rent or mesne profits (it matters not which expression is used) up to the present time; they paid a sum of 1268*l.* 5*s.* on April 11, without prejudice to their rights, and are liable to pay compensation calculated upon the same principle until the plaintiffs obtain possession. That is not the difficulty which arises in this action: the difficulty is whether I am to give the plaintiffs judgment for possession of the premises, and so shut out the defendants from the relief which they ask by their defence and counter-claim. They submit that they are entitled to relief from the right of re-entry under the Conveyancing and Law of Property Act, 1892, and ask for that relief upon such terms as I may think fit to impose.

Before going into the very important and interesting question which this case raises as to the true effect of s. 4 of the Act of 1892, I ought to state the proceedings that have taken place in the Bankruptcy Court. On May 12, 1893, the trustee gave notice of his intention to disclaim the property, there being of course a reversion in the bankrupt; and on June 5 he actually disclaimed, and notice of the disclaimer was given. Nothing was done in the Court of Bankruptcy. Had Messrs. Nicholson

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document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the Court in the circumstances of each case shall think fit, but in no case shall any such underlessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease."

been so minded, I think that they might have applied to that Court for a vesting order. If the Bankruptcy Act, 1883, had remained unamended they could only have got a vesting order from that Court upon the terms of their coming under the same obligations to the landlord that Sewell had formerly been under; but the Court of Bankruptcy now has power, under s. 13 of the Bankruptcy Act, 1890, to subject, if it thinks fit, the person in whose favour it makes a vesting order to the same liabilities and obligations only as if he were an assignee of the bankrupt's lease. It seems to me therefore, rightly or wrongly, that Messrs. Nicholson might have taken up the position that they were entitled to ask the Court of Bankruptcy for a vesting order upon the terms that they should accept the responsibilities of a mere assignee, and not the whole responsibilities of Sewell. However that may be, they did not do so, and no doubt they are now excluded from the advantages which they might have obtained by such an application. I do not think, however, that that fact ought to affect my decision; this action was commenced and the defence and counter-claim delivered long before any disclaimer by the trustee, and I must decide the action irrespective of anything that did or did not take place in the Court of Bankruptcy.

I now come to the question whether the defendants are entitled to the benefit of s. 4 of the Act of 1892. During this interesting discussion I have been reminded of the history of the law of forfeiture and of the principles upon which Courts of Equity formerly gave relief against forfeitures and penalties. No doubt, to go back to early times, as between landlord and tenant, forfeiture could not be relieved against in the sense in which those expressions are now understood, although from a very early period the Court of Chancery, quite apart from statutory enactment, was in the habit of giving relief in the form of ordering a new lease to be executed between the parties. But so long ago as 4 Geo. 2, c. 28, a statutory power of granting relief was conferred upon the Court, which as between landlord and tenant was undoubtedly conditional upon payment of the rent in respect of which the forfeiture had accrued due. As time went on other breaches of covenant were relieved against upon terms, of which

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there is an example in the Real Property Amendment Act, 1859 (Lord St. Leonards' Act), which authorized giving relief from, inter alia, the breach of a covenant to insure. But the provisions as to relief contained in that Act and in Lord Cranworth's Act of the following year become unimportant in view of the passing of the Conveyancing and Law of Property Act, 1881, by s. 14, sub-s. 2, of which statute a very extended right to grant relief is given to the Court. By sub-s. 1 considerable restriction is placed upon the lessor's right to re-entry, and by sub-s. 2 the power to grant relief to a lessee where the lessor is proceeding to exercise his right of re-entry is extended to any case in which the Court may in its discretion think fit to grant or refuse relief. This shews that the history of this legislation is a progressive history, and that the statutory power to grant relief against forfeiture has been gradually extended from the single case of non-payment of rent till it has reached its present dimensions. Then comes sub-s. 6, which provides that the section is not to extend to (inter alia) a condition for forfeiture on the bankruptcy of the lessee. In the present case sub-s. 6 applies, and the lessee, Sewell, clearly could not obtain relief from forfeiture by reason of his bankruptcy.

After the passing of the Act of 1881 it was much discussed whether s. 14 applied to an underlessee as well as to a lessee, and the discussion no doubt owed its origin to the language of sub-s. 3, which prescribed what, for the purposes of this section, a lease was to be considered to include; inter alia, it is to include an original or derivative underlease, and a lessee includes an original or derivative underlessee. In two cases—*Burt* v. *Gray* (1) and *Creswell* v. *Davidson* (2)—it was held that the benefit of s. 14 could not be claimed by an underlessee of a part only of the demised premises, and in the recent case of *Nind* v. *Nineteenth Century Building Society* (3) it was held that, as between himself and the original lessee, an underlessee of the whole premises was not a lessee within the meaning of that section or s. 2 of the Act of 1892. No doubt the two former decisions, which shewed that an underlessee had been left unprotected by the Act of 1881,

(1) [1891] 2 Q. B. 98. (2) 56 L. T. (N.S.) 811.
(3) [1894] 2 Q. B. 226.

led in some measure to the passing of the Act of 1892, which is to be read as one with the Conveyancing Acts of 1881 and 1882.

I have, therefore, now to ask myself what is the true construction of s. 4 of the Act of 1892; and if the true construction of its actual language is repugnant to any other part of what is practically the same statute, then, applying the principles laid down in *Ebbs* v. *Boulnois* (1), I must give the best interpretation to the Act that I can, and not allow the section in the later Act to induce me to give to it a larger construction than it ought to bear, having regard to the section of the earlier Act. No doubt there is considerable difficulty in the matter, for if the construction contended for by the defendants be the correct one, the legislature has now said that the underlessee is to have in one sense a better right than the lessee himself, for it has used language which, upon that interpretation of it, is capable of including the case of an underlessee in a set of circumstances in which the lessee himself would be unable to apply for relief. The present case is just one of those cases: Sewell could not apply for relief because, by reason of his bankruptcy, sub-s. 6 operates to exclude him from the benefit of the section, while Messrs. Nicholson are plainly within the language of s. 4 of the Act of 1892. That section does not provide that the underlessee is to have relief in those cases in which the lessee would be entitled to ask for relief under s. 14 of the earlier Act; it is not so framed, but is framed in an unqualified manner, and gives power where the lessor is proceeding to enforce a right of re-entry or forfeiture under any covenant in a lease, upon application by any person claiming as underlessee any estate or interest in the property comprised in the lease or any part thereof, to make an order vesting the property for the whole term of the lease or any less term in the person claiming as underlessee upon such conditions as approve themselves to the Court. Now, is there any real reason, either in the principle or the history of the matter, why I should restrict the meaning of these very plain words? I can see none. I look at the question as though s. 4 of the Act of 1892 had followed s. 14 in the Act of

(1) Law Rep. 10 Ch. 479.

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1881; and, reading those two sections together, I can see no reason for placing a limited construction on s. 4, while, looking at the history of the matter, I can see many reasons for not doing so. I can imagine many cases in which it would be inequitable to allow a head lessee to apply for relief, but where it would be right to allow a sub-lessee to apply, and I think this case is one of them. It would not be right to allow a lessee who had managed his affairs so badly as to become a bankrupt to apply for relief under any conditions whatever, and it seems perfectly consistent that he should be excluded while the legislature allows the underlessee to apply for and obtain relief if he is a fit person to have it. I feel a difficulty in varying the plain language of an Act of Parliament in compliance with any supposed scheme which the legislature may have had in view. I must, it is true, interpret both the sections together; but in doing so I must still give to each section the full weight which ought to be given to each of the words contained in it. There is no necessary repugnancy or inconsistency between the two sections, and I am not obliged to construe s. 4 in the sense that the underlessee is to be no better off than if he were the lessee. I can perfectly sensibly read the two sections together, and doing so I find that the underlessee may become entitled to a right which the lessee himself could not be entitled to. It is said that this is a very strange result; but the whole of these sections as to giving relief as between landlord and tenant are strange, and would seem very strange to those who lived a century ago. This interference with the contractual rights between landlord and tenant is comparatively modern, certainly with respect to all other covenants than a covenant to pay rent, which stands upon a different footing from a covenant to make a mere money payment. Therefore, although I feel that I am giving these underlessees a right which Sewell himself would not have possessed, still I hold in their favour that I have jurisdiction under s. 4 of the Act of 1892 to give them some relief from the forfeiture which undoubtedly had been incurred.

The question now arises upon what terms I ought to give the relief they ask. They ask that I should vest the premises in them upon the terms of their becoming assignees and of their

assuming the liabilities of Sewell as assignee, and not otherwise. On the other hand, it is said that there are two reasons why I ought not to grant relief upon any such terms. First, it is said that in the interval since the time when the rent of these premises was fixed the property has become more valuable, and that the rent ought to be £850. Assuming, in the plaintiffs' favour, that that rental might be commanded, I do not feel able to raise the rent upon these sub-lessees, and I very much doubt if I have any jurisdiction to do so. I doubt whether s. 4, in giving me power to impose any condition upon a sub-lessee as to the execution of any document, payment of rent, or otherwise, meant to authorize me to raise upon a sub-lessee, as a condition of a vesting order, not the rent which they are paying to their own lessor, but the head rent payable to the head lessor. Whether I have jurisdiction or not, I do not feel inclined to raise the rent of these underlessees higher than the head rent which Sewell was liable to pay; that rent the Messrs. Nicholson must pay to the plaintiffs.

As to the covenants into which the underlessees are to enter, it is said on their own behalf that they should only be such covenants as Sewell would be liable to as assignee of the lease, while the plaintiffs contend that the covenants should be in all respects the same as those into which Sewell had entered. It is the practice of the plaintiffs, as a condition of giving their licence to assign, to insist upon the successive assignees of a lease entering into personal covenants with them for the performance of the covenants in the original lease. Sewell, therefore, was not a mere assignee; he was an assignee with this covenant imposed upon him as a condition of allowing the assignment. Those terms, I think, I must impose upon Messrs. Nicholson. The argument on behalf of the defendants, if pressed to its logical conclusion, would I think lead to this, that I ought to make an order vesting the property in them upon the terms of their performing all the covenants that they were under towards Sewell; so that, supposing Sewell had taken a large premium with a much smaller annual rent, I should have to vest the rest of the term in Messrs. Nicholson, upon their paying to the head landlord the reduced rent which they covenanted to pay to Sewell. That

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cannot be right, nor would it be equitable to make a vesting order upon any such terms. Then the defendants say that they are quite ready to accept the position of assignees, and to accept Sewell's responsibility for the rent, so long as they are only assignees. I think, however, that that is not enough, and that if they are ready to accept Sewell's responsibilities and liabilities as assignee, they must accept them upon the same terms as Sewell accepted them and as the plaintiffs were induced to grant them.

The result, therefore, will be this. I must declare that the plaintiffs are entitled to the possession of these premises. I do not, however, give them judgment for possession; but I grant a vesting order vesting the premises in the defendants Messrs. Nicholson for the whole of their term upon payment by them of all the rent due, if any, and upon their executing a deed containing the same covenants with reference to these premises, and so far as their term is concerned, as Sewell was under with respect to his term; and I need hardly say that, inasmuch as I have decided the conditions of relief in favour of the plaintiffs, the defendants must pay the costs of this action.

Solicitors for plaintiffs: *Wilmer & Reeves.*

Solicitors for defendants, Messrs. Nicholson: *Nash, Field & Co.*

W. J. B.

IN RE AN ARBITRATION BETWEEN LORD GERARD AND THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

1894
July 27;
Aug. 6.

Railway—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77–80—*Minerals—Purchase by Railway Company of all Subjacent Strata except Coal—Right of Owner of Coal to Compensation before the commencement of working Coal Mine.*

A railway company having given to a landowner, beneath whose land were valuable beds of coal, a notice to treat for certain land, "together with the stone, sand, clay and gravel within and under the same," and a second notice to treat for certain other land, "together with the mines and minerals thereunder, except all mines, beds and seams of coal"; the amount of the purchase-money and compensation payable to the landowner under the notices to treat was referred to arbitration. At the date of the arbitration the subjacent and adjacent coal was not being worked, nor was there any immediate prospect of its being worked in the ordinary course of mining. At the hearing of the arbitration evidence was admitted by the arbitrator of the value of the subjacent and adjacent coal which it would be necessary to leave for the support of the railway:—

Held, that the evidence was wrongly admitted; that the rights of the landowner and the railway company were not altered by the fact that the latter had taken some of the underground strata as well as the surface of the land; and that the landowner was not entitled to recover compensation in respect of ungotten coal until the time arrived for working the coal-beds, and then only by virtue of proceedings under s. 77 and the following sections of the Railways Clauses Consolidation Act, 1845.

RULE NISI to set aside a submission to arbitration upon the ground of improper reception of evidence by the arbitrator.

Lord Gerard was tenant for life in possession of certain lands underneath which were valuable seams of coal and through which ran the line of the London and North Western Railway. On June 3, 1889, the railway company, being about to widen their line, gave to Lord Gerard, in the exercise of their statutory powers, a notice to treat in respect of certain lands and hereditaments, "together with the stone, sand, clay and gravel within and under the same," and, with the assent of Lord Gerard, shortly afterwards entered upon and used the land. On July 23, 1891, the company gave to Lord Gerard a second notice to treat in respect of other land, "together with the mines and minerals thereunder, except all mines, beds and seams of coal," and

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subsequently entered upon and used the land. On May 7, 1894, an agreement was entered into between Lord Gerard and the railway company, in which it was referred to an arbitrator to determine the purchase-money to be paid for the value of the estate and interest of Lord Gerard in the lands and minerals taken, and the compensation payable to him for damage by severance or otherwise injuriously affecting his other lands and minerals in consequence of the exercise of their statutory powers by the railway company. The subjacent and adjacent coal was not being worked at the date of the arbitration, nor was there any immediate prospect of its being worked by the mine-owner or his lessees. Before the arbitrator evidence was tendered of the value of the subjacent coal and of the adjacent coal which would have to be left in order to afford subjacent and adjacent support to the railway. The company contended that the mining clauses of the Railways Clauses Consolidation Act, 1845, applied to the case, and that a claim in respect of the coal to be left unworked could only arise when in the ordinary course of working the time arrived for getting the coal. The arbitrator admitted the evidence, and this rule was obtained on behalf of the railway company.

Sir R. E. Webster, Q.C., and *Moulton, Q.C.* (*Pollard*, with them), shewed cause. The evidence was properly admitted by the arbitrator. The provisions of s. 77 and the following sections of the Railways Clauses Consolidation Act do not apply, for this is not the case of an ordinary notice to treat in respect of the surface of land required for a railway; there is here a statutory bargain to purchase, in the one case, certain named minerals, and in the other case all the minerals except coal. Having bought the surface, together with certain strata of solid earth below, the company have also bought or acquired the right of support for those strata as well as for the surface, and the mine-owner can never work the subjacent or adjacent coal without interfering with that right of support. Further, it would be impossible for the mine-owner to take advantage of s. 80 by making driftways under the railway to connect his mines on the one side with those on the other without going through, and to some extent

taking away, the strata of sand, gravel, &c., which the company have bought. The company cannot set up the mining clauses in order to avoid the usual consequences of a contract of purchase, and the mine-owner is therefore entitled to present compensation in respect of the coal which will have to be left in order to afford the necessary support for the land and subjacent strata bought by the company. [They cited *Elliot* v. *North Eastern Ry. Co.* (1); *London and North Western Ry. Co.* v. *Evans.* (2)]

Sir Henry James, Q.C. (*H. D. Greene, Q.C.*, and *Page*, with him), in support of the rule. The evidence was not admissible in an arbitration to assess the amount of purchase-money and compensation under these notices to treat. The mine-owner can only obtain compensation for his minerals by availing himself of the provisions of s. 77 and the following sections of the Railways Clauses Consolidation Act. The effect of that Act was entirely to alter, in the case of railway companies, the right to support to land; by purchasing land without the mines or minerals underlying it, for the purposes of its undertaking, a railway company does not acquire the rights of an ordinary purchaser to subjacent and adjacent support: *Great Western Ry. Co.* v. *Bennett.* (3) When the time arrives for working the excepted minerals, the mine-owner is entitled, if the company refuse to make compensation, to work the mines according to the usual mode of working in the district, even if that involves working them from the surface and thereby destroying the railway line: *Ruabon Brick and Terra Cotta Co.* v. *Great Western Ry. Co.* (4) It was to prevent the application of the Ruabon case and the possible destruction of the railway by downward working that the notices to treat were given in this form. A railway company acquires no greater right of support for its line if it purchases something below the surface than if it purchases the surface lands only. If the mine-owner has a right, for the purpose of working his mine, to break through the surface which the company has bought, he must also have the right, for the purpose of making the mining communications contemplated by s. 80, to break through the subjacent strata bought by the company.

(1) 10 H. L. C. 333.
(2) [1893] 1 Ch. 16.
(3) Law Rep. 2 H. L. 27.
(4) [1893] 1 Ch. 427.

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[He also cited *Errington* v. *Metropolitan District Ry. Co.* (1); *Holliday* v. *Mayor of Wakefield.* (2)]

Cur. adv. vult.

Aug. 6. The judgment of the Court (Mathew and Kennedy, JJ.) was read by

KENNEDY, J. In this case the application is, in form, to revoke a submission to arbitration. In reality, it is made for the purpose of obtaining a decision from the Court as to the validity of certain heads of claim which one of the parties to the arbitration has put forward, and which the other party asserts to be improper. In order that the point may be raised before us, the claimant has adduced, as early as possible in the arbitration proceedings, and the learned arbitrator has received, certain evidence which is admissible only if the disputed heads of claim are proper; and thereupon the question of law which the parties desire to have authoritatively decided, before further expense is incurred in the arbitration, has been raised in its simplest and most convenient form by the application which is now before us.

The material facts are these. Lord Gerard is the tenant for life of certain lands having subjacent mines, near Wigan, through which passes the line of the London and North Western Railway Company. In reference to a portion of these lands the railway company gave a notice to treat on June 3, 1889; and in reference to another portion of them the railway company gave a notice to treat on July 23, 1891. The agreement of reference, reciting these notices, bears date May 7, 1894. The only material point in regard to these notices—and indeed it is this point that gives rise to the present dispute between the parties—is that in each notice the railway company states that it requires to purchase and take something more than the lands set out in the schedule to the notice; in the one case "the stone, sand, clay and gravel within and under the same," and in the other "the mines and minerals thereunder, except all mines, beds and seams of coal." In substance, that is to say, the railway company requires to purchase and take the surface lands and also all the strata underneath the lands, with the one important

(1) 19 Ch. D. 559. (2) [1891] A. C. 81.

exception of the coal, several seams of which run under parts of the lands in question, and are there as yet unworked.

Lord Gerard claims, and he has tendered evidence to the learned arbitrator in support of this claim, that he is entitled to receive present compensation in consequence of being bound in law to leave unworked large quantities of coal both subjacent and adjacent to the land (including in the term "land" those minerals which are specified in the notices to treat) in order to afford the necessary vertical and lateral support to such land and minerals, and also in consequence of its being impossible to work the coal (as he alleges) without taking away part of the land and minerals actually sold. He also claims present compensation on the ground that, in consequence of the railway company taking the minerals specified in the notice to treat, he will have (as he alleges) no power or right to remove or pass through such minerals, and will thus be prevented from working certain of the coal belonging to him, either at all, or at the same cost as that at which he might otherwise have worked it. The evidence objected to by the railway company and admitted by the learned arbitrator is evidence in support of these claims of Lord Gerard. From a pecuniary point of view, as the claims under these heads amount to upwards of 180,000*l.*, the matter is one of great importance. If Lord Gerard's contention is well-founded, the effect of the notices to treat is to make the railway company pay presently not only the price of the lands and the clay, sand, stone and gravel specified in the notices, but also compensation in respect of all the subjacent coal, and, further, of the adjacent coal, to the extent of the buttress required to support the minerals included in the notices, besides additional compensation for severance by reason of the property taken by the railway company preventing the coal on the one side of the line from being worked from pits on the other side, and so necessitating the sinking of pits on both sides of the line.

The argument put forward by Lord Gerard's counsel is this: "The railway company is not merely taking 'lands.' If it was" say they, "we concede that these claims could not be put forward now or in this arbitration. The matter would be one which could be dealt with only when the owner of the coals seeks to

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win his coal under and near the railway, and it would then be dealt with under the provisions 'with respect to mines lying under or near the railway' which are contained in the 77th and following sections of the Railways Clauses Act, 1845. But in this case the railway company is taking, besides 'lands,' the stone, sand, clay, and gravel within and under the lands—all the strata, in effect, under the surface, except the coal. The effect of this is that, as regards the subjacent coal, the owner of the coal cannot get any of it. It is so interposed between the strata which the railway company has bought from us that he cannot win it without removing and taking away portions of those strata, and he cannot lawfully remove and take away that which is not his, but the company's, property. To do so would be a wrongful act.

"In the next case, apart from any question as to letting down the surface of the lands, the owner cannot get his coal without letting down the strata which the railway company has bought from him. With the grant to the company of the stone, sand, clay and gravel there has passed to the company the right to have these strata supported. Therefore the coal-owner cannot lawfully get the coal, either subjacent or adjacent, by which they are supported.

"Lastly, by reason of the purchase of the specified minerals as well as the lands, the coal-owner cannot work the coal on one side of the railway, as he might otherwise have done, from the other side, without committing a trespass. Therefore, he must sink pits on both sides. For all these losses he is entitled to be compensated immediately."

It appears to us that these contentions are not well-founded in law. In our judgment, the provisions of the 77th and following sections of the Railways Clauses Act, 1845, apply, not merely where no mines and minerals are taken by the railway company with the lands, but in every case in which any mine or mineral is not taken with the lands.

The 77th section enacts that unless they are expressly included subjacent mines of coal, ironstone, slate, or other minerals are not included in a purchase of "lands." The 78th section enacts that if the person entitled to any mines or minerals

under or near the railway or the railway works wishes to work them he must give the railway company a certain notice of his intention, and if the railway company deem it needful for the safety of their works to prevent such getting of the mines or minerals, they may prevent the owner from getting them, paying him compensation for such prevention. If the railway company is not willing to entertain the question of compensation, then, under the 79th section, it is lawful for the mine-owner to work "the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof and according to the usual manner of working such mines in the district where the same shall be situate."

The 80th, 81st, and 82nd sections, as to the effect of which there is an instructive passage in the judgment of Pearson, J.—*Midland Ry. Co.* v. *Miles* (1)—deal with the case of severance by reason of the railway company having for the safety of their works prevented the working of mines under their railway by purchasing them, and so severed mines on the one side of their railway from mines on the other side. In such a case the owners of the several mines may make all necessary mining communications through the barrier which the railway company's action has created, but not over the railway or railway works, or so as to injure them or impede the passage thereon. The railway company, on its part, is bound to compensate the mine-owner for additional cost and loss thrown upon him in the getting of his minerals, and for all coal which he is altogether prevented from getting by the making and maintenance of the railway and railway works. The railway company is further bound to compensate any third party who is the owner of surface land injuriously affected by the mine-owner's creating the mining communications for loss or damage caused to such third party thereby.

Sections 83, 84 and 85 contain provisions for securing to the railway company means to detect and prevent any improper working of mines which threatens the safety of their works.

We see nothing in these sections to render their provisions

(1) 30 Ch. D. 634, at pp. 639, 640, 641.

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inapplicable to a case in which the railway company has, as in the present case, purchased with the "lands" certain specified subjacent minerals, but has left the others to the owner—nothing which confines their provisions for the adjustment of the relations between the railway company and the owner of subjacent minerals to the case of the purchase of "lands" only. We fail to find any ground for the distinction, contended for by Lord Gerard's counsel, between letting down surface soil and letting down minerals bought by the company with the soil, or for the argument that Lord Gerard would be a wrongdoer if in properly working his works he interfered by removal or otherwise with the clay or sand which the company has bought under the surface, when he would not be a wrongdoer if he interfered with the soil on the surface.

The railway company can legally acquire either surface or minerals for the purpose of their undertaking, and for that purpose only; and the scheme of these statutory provisions appears to us clearly to be that the owner of any subjacent mineral, not purchased by the company, may lawfully get his mineral by proper working, whatever else the company may have bought, subject only to the due protection of the works of the undertaking; and if, and so far as, such due protection prevents his getting his mineral or renders it more costly, he is to be compensated when the time for working under or near the railway works arrives, and not before.

For these reasons, in our judgment, these claims of the respondent to this application fail, and the learned arbitrator should have rejected the evidence tendered in support of them.

We will only add that several cases were cited to us in the course of the argument, but we do not think it would serve any useful purpose to refer to them particularly. None appear to us to be authorities directly in point.

Rule absolute.

Solicitors for claimant: *Meynell & Pemberton.*
Solicitor for company: *C. H. Mason.*

W. J. B.

IN RE A BILL OF SALE. WHITE TO RUBERY.

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July 27.

Bill of Sale—Entry of Satisfaction—Affidavit of Verification—Order LXI., *r. 26—Central Office Practice Rules, r. 25.*

The affidavit verifying the signature and consent of the person entitled to the benefit of a bill of sale to the entry of satisfaction of the bill of sale need not be made by a solicitor.

APPEAL from chambers.

An application had been made to a master at chambers to allow the entry of satisfaction of a bill of sale; a consent to the satisfaction had been signed by the bill of sale holder, whose signature was verified by the affidavit of a deponent who was not a solicitor. By Order LXI., r. 26, "a memorandum of satisfaction may be ordered to be written upon a registered copy of a bill of sale, on a consent to the satisfaction, signed by the person entitled to the benefit of the bill of sale, and verified by affidavit, being produced to the registrar, and filed in the Central Office." By rule 25 of the Central Office Practice Rules, "If the attesting witness and deponent is a solicitor, and described as such, the entry of the satisfaction will be directed by the master (the papers being otherwise correct) as of course; but under special circumstances the master may accept any other deponent if satisfied that he is a proper person to attest and verify the signature and consent." No special circumstances were shewn in the present case. The master at chambers took the objection that the affidavit should have been made by a solicitor, and referred the application to the judge, who referred it to the Court.

Germaine, for the applicant. The language of Order LXI., r. 26, is plain; it contains no limitation of the class of persons who may make the affidavit of verification; nothing is said in the rule about special circumstances, and the deponent need not be a solicitor. The Central Office Practice Rules have no statutory authority, and the requirements of rule 25 are ultrà vires.

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MATHEW, J. It is quite clear that we have power to order satisfaction of this bill of sale to be entered, and that the affidavit is sufficient.

KENNEDY, J., concurred.

Solicitors for applicant: *Smiles & Co.*

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Aug. 2.

IN RE ELIZABETH ALLEN.

Metropolis—Local Management—Procedure for recovery of Rates—Imprisonment in Default of Distress—Married Woman—Owner—Compounding for Rates—12 & 13 *Vict. c.* 14, *s.* 2—*Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 161—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4—*Summary Jurisdiction Acts*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35; 1884 (47 & 48 *Vict. c.* 43); *ss.* 7, 10—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-s.* 11.

The Summary Jurisdiction Acts, 1879 and 1884, and the Interpretation Act, 1889, have not had the effect of superseding the remedy—namely, by distress and imprisonment in default of a sufficient distress—for the recovery of local rates recoverable, under s. 161 of the Metropolis Local Management Act, 1855, in the same manner as poor-rates.

A married woman, being owner of houses in a metropolitan parish as her separate property, gave notice to the overseers, under s. 4 of the Poor Rate Assessment and Collection Act, 1869, that she was willing to be rated in respect of such houses, whether the same were occupied or not, and that she claimed to be allowed the deductions from the amount of the rate, amounting to 30 per cent., specified in that section. Having been rated and allowed such deductions accordingly, she made default in paying the amount of the sewers, lighting, and general rates for the parish, which, by the Metropolis Local Management Act, 1855, are recoverable in the same manner as poor-rates:—

Held, that she had made no contract with the overseers in respect of the rates so as to bring the case within s. 1 of the Married Women's Property Act, 1882, and the decision in *Scott* v. *Morley* (20 Q. B. D. 120), and therefore that she was liable to the ordinary remedy for the recovery of poor-rates—namely, by distress and imprisonment in default of a sufficient distress.

APPLICATION for a writ of habeas corpus.

In December, 1892, Elizabeth Allen, a married woman, being the owner of several houses in the parish of Fulham as her separate property without any restraint on anticipation, gave to

the overseers of the poor of the parish, under the Poor Rate Assessment and Collection Act, 1869, s. 3 (1), notice that she was

(1) 32 & 33 Vict. c. 41, s. 3: "In case the rateable value of any hereditament does not exceed 20*l.*, if the hereditament is situate in the metropolis, . . . and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor-rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor-rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding 25 per cent. on the amount thereof."

Sect. 4: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which s. 3 of this Act extends, situate within such parish, shall be rated to the poor-rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect:—

"1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of 15 per cent. from the amount of the rate:—

"2. If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding 15 per cent. from the amount of the rate during the time he is so rated:" . . .

"Provided that this clause shall not be applicable to any rateable hereditament in which a dwelling-house shall not be included."

Sect. 11: "Where the owner has become liable to the payment of the poor-rates, the rates due from him, together with the costs and charges of levying and recovering the same, may be levied on the goods of the owner, and be recovered from him in the same way as poor-rates may be recovered from the occupier."

12 & 13 Vict. c. 14, s. 2, after reciting that by 43 Eliz. c. 2, in default of distress for a poor-rate two justices of the peace may commit the party against whom the distress warrant shall have issued to the common gaol of the county, there to remain without bail or mainprize until payment, enacts that the recited provisions of the Act of Elizabeth shall be repealed, and that thereafter, when to any warrant of distress for the levying of any sum or sums due in respect of any poor-rate it shall be returned by the constable or person having the execution of such warrant that he could find no goods or chattels, or no sufficient goods or chattels whereon to levy such sum or sums, it shall be lawful for any two or more justices of the peace, before whom the same shall be returned, to issue their warrant of commitment against the person in default, and to order him to be imprisoned for any time not exceeding three calendar months.

By the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 161, the overseers of the poor of metropolitan parishes are directed to

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willing to agree to be rated for one year from such date, and for each succeeding year until further notice, in respect of all the rateable hereditaments of which she was the owner, whether all or any of the hereditaments were occupied or not. Subsequently she signed a printed form supplied to her by the overseers in respect of each of her houses, which, so far as is material, was as follows:—

"To the Overseers of the Poor of the Parish of Fulham in the County of London.

"I, the undersigned, being the owner or agent of certain rateable hereditaments in the above-named parish, each of which includes a dwelling-house, and is of a rateable value not exceeding 20*l.*, hereby give you notice that I am willing to be rated for one year from the date hereof, in respect of all such rateable hereditaments of which I am the owner or agent, and situate in the parish, whether all or any of the hereditaments be occupied or not; and I request that you will duly act upon such notice in conformity with the provisions of s. 4 of 32 & 33 Vict. c. 41, ... so that I may be assessed to the poor-rates and the metropolis local management rates in respect of the aforesaid hereditaments accordingly, and be allowed an abatement or deduction of 30 per centum from the amount of the rates during the time that I am so rated. And I also give you notice that I am willing to be so rated each succeeding year after the expiration of one year from the date thereof, until I give you notice in writing of my desire to cancel such notice for the next succeeding year.

"Dated, &c."

The form was headed with a note as follows:—

"N.B. Unless this form is returned, 15% deduction only can be allowed."

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make separate rates called a "sewers rate," "lighting rate," and a "general rate"; and "such rates shall be levied on the persons and in respect of the property by law rateable to the relief of the poor in the respective parishes, and shall be assessed on the net annual value of such property ascertained by the rate for the time being for the relief of the poor; and the said overseers shall, for the purpose of levying such rates, proceed in the same manner, and have the same powers, remedies, and privileges as for levying money for the relief of the poor."

The vestry of the parish of Fulham had, prior to Mrs. Allen signing the form, made an order under s. 4 of the Poor Rate Assessment and Collection Act, 1869, that the owners of all rateable property to which s. 3 extended should be rated to the poor-rate, instead of the occupiers, on all rates made after the date of the order.

Mrs. Allen was rated by the overseers as owner, and allowed a deduction of 30 per cent. in accordance with her notice given under s. 4.

In December, 1893, a demand was made on Mrs. Allen for payment of the amount assessed on her for the poor-rate, lighting-rate, sewers-rate, and general district rate then due. She paid the poor-rate, but made default in payment of the other rates, and an application on behalf of the overseers was thereupon made for a warrant of distress, which was issued accordingly. The return made to the warrant was, nulla bona. The overseers then applied, under 12 & 13 Vict. c. 14, for a warrant of commitment against Mrs. Allen. The justices granted the warrant; it was executed, and Mrs. Allen was committed to prison for twenty-eight days.

Thereupon a summons was taken out by her husband calling upon the vestry of the parish of Fulham, or its officers, and the gaoler of the prison, to shew cause why a writ of habeas corpus should not issue to the gaoler to bring up Mrs. Allen before the judge at chambers.

Upon the parties summoned attending to shew cause, Wright, J., in chambers, referred the matter to the Court.

W. H. Stevenson, for the applicant. First, the magistrate had no jurisdiction to grant a warrant of commitment against Mrs. Allen. Her contract with the rating authority to compound for the rates could only be enforced against her separate estate: *Scott* v. *Morley*. (1) The proceeding taken against her is a civil proceeding, and comes within the words "action or other proceeding" in s. 1, sub-s. 2, of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75). The remedy of the parish authorities probably was to have an equitable receiver of her separate estate

(1) 20 Q. B. D. 120.

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appointed. Under the Married Women's Property Act, 1882, s. 1, she is only capable of contracting with respect to her separate estate; she could not have made this contract at common law. Secondly, the poor-rate and the rates for the non-payment of which Mrs. Allen has been committed to prison are now recoverable only as civil debts in the manner provided by the Summary Jurisdiction Act, 1879. (1) The old procedure under 12 & 13 Vict. c. 14, s. 2, has been superseded. In *Reg.* v. *Price* (2) the

(1) By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 6, "Where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act and not otherwise."

By s. 35, civil debts recoverable summarily shall not, in default of distress or otherwise, be enforced by imprisonment, unless it be proved that the person making default in payment either has, or has had since the date of the order to pay, the means to pay, and has refused or neglected, or refuses or neglects, to pay; and, in that case, the court of summary jurisdiction has the same power of imprisonment as the county court would have under the Debtors Act, 1869 (32 & 33 Vict. c. 62), but no greater power.

By the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), many previous enactments are repealed; and, by s. 5, the repeal effected "shall not take away any jurisdiction of any justices to act summarily in any matter referred to in any enactment hereby repealed, and the Summary Jurisdiction Acts shall, so far as is consistent with the tenor thereof, apply to every proceeding before justices as to which the procedure is wholly or partly repealed by this Act in substitution for the procedure so repealed."

[One of the enactments so repealed is s. 9 of 12 & 13 Vict. c. 14, which gives the same remedy for the recovery of church rates as is given by that Act in respect of the recovery of poor-rates.]

By s. 7, the definition of "court of summary jurisdiction" given in s. 50 of the Summary Jurisdiction Act, 1879, is made to include justices or magistrates whether acting under the Summary Jurisdiction Acts or any of them, "or under any other Act by virtue of their commission or by the common law."

By s. 10, "Nothing in this Act shall alter the procedure for the recovery of or any remedy for the non-payment of any poor-rate, or of any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction."

By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the 7th section of the Summary Jurisdiction Act, 1884, is repealed; but the same definition of the expression "court of summary jurisdiction" is re-enacted (s. 13, sub-s. 11), and made to apply to all Acts of Parliament in which the expression occurs.

(2) 5 Q. B. D. 300.

Queen's Bench Division, it is true, held that the provisions of the Summary Jurisdiction Act, 1879, did not apply to proceedings for the recovery of poor-rates; but it is contended that the effect of the Summary Jurisdiction Act, 1884, ss. 5 and 7, and of the Interpretation Act, 1889, is to constitute magistrates, who act in enforcing payment of poor-rates and other rates, a court of summary jurisdiction to which ss. 6 and 35 of the Summary Jurisdiction Act, 1879, now apply. In *Reg.* v. *Lord Mayor of London* (1) the Queen's Bench Division held that a magistrate sitting to hear a proceeding for the recovery of a sewers rate under the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.) (which gave the same powers of distress and commitment as are given by 12 & 13 Vict. c. 14) was sitting as a court of summary jurisdiction under the Summary Jurisdiction Acts, and that decision has been cited as good law in *Fourth City Mutual Building Society* v. *Churchwardens, &c., of East Ham.* (2) Sect. 10 of the Summary Jurisdiction Act, 1884, does not except sewer, lighting, and general district rates from the procedure of the Summary Jurisdiction Acts. In *Reg.* v. *Lord Mayor of London* (1) the Court expressly decided that the sewers rate was a rate the payment of which is adjudged by the conviction or order of a court of summary jurisdiction, and the lighting and general district rates are in the same position.

It is further contended that there is no power to arrest a married woman upon any civil process, and this was a civil process.

Poland, Q.C. (*J. P. Grain*, with him), for the vestry. As to the first point taken on behalf of the applicant, the Married Women's Property Act, 1882, has no application to this case. Mrs. Allen made no contract with the rating authority: she only took advantage of the indulgence given to owners of property by the Poor Rate Assessment and Collection Act, 1869. She was liable to be rated in respect of receiving the rents of the property. Sect. 4 provides that the owner of rateable hereditaments to which s. 3 applies "shall be rated instead of the occupiers"; and, if he undertakes to be rated for any term less than one year in respect of all such hereditaments, whether the

(1) 57 L. T. (N.S.) 491. (2) [1892] 1 Q. B. 661.

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same be occupied or not, the overseers "shall rate such owner accordingly," and allow to him the specified deduction. If the procedure followed in this case cannot be applied to a married woman who compounds for the rates under the Act of 1869, there are no means of enforcing payment. Her husband cannot be made liable, because he is not the owner; and the rating authority is left without any remedy.

On the second point taken, Jervis's Act (11 & 12 Vict. c. 43) did not apply to proceedings for the recovery of poor-rates; but a complete code of procedure for the recovery of poor-rates, and other rates recoverable in the same manner, is provided by 12 & 13 Vict. c. 14, and the Metropolis Local Management Act of 1855. Sect. 161 of the latter statute clearly places the three parochial rates in question here in exactly the same position, as regards the procedure for recovery, as the poor-rate. That procedure has not been done away with by the Summary Jurisdiction Acts, 1879 and 1884, and the Interpretation Act, 1889. *Reg.* v. *Price* (1) decided that the Act of 1879 did not apply to proceedings for the recovery of poor-rates and other rates recoverable in the same manner, on the ground that the liability to pay the rate is created by statute, and does not depend upon any order of the justices. The Act of 1884 and the Interpretation Act, 1889, only had the effect of making justices, acting under any statutory power or by the common law, a court of summary jurisdiction for the purpose of enabling them to state a case. It may be conceded that justices, acting in respect of proceedings for the recovery of poor-rates and other rates recoverable in the same manner, are a court of summary jurisdiction for that purpose. That is all that was decided in *Reg.* v. *Lord Mayor of London* (2), which case does not in any way conflict with the contention that the old procedure still remains in force. Sect. 10 of the Summary Jurisdiction Act, 1884, expressly saves it; and there is no repeal in that Act of any enactment in 12 & 13 Vict. c. 14, with respect to the recovery of the rates in question. There is no authority for the proposition that a married woman is not liable to arrest.

W. H. Stevenson, replied.

(1) 5 Q. B. D. 300. (2) 57 L. T. (N. S.) 491.

MATHEW, J. This application must be refused. The first position, in order of importance, taken up by counsel for the applicant was that the remedy for enforcing the payment of poor-rates by imprisonment in default of distress was gone; that this proceeding before the magistrates was a proceeding in a court of summary jurisdiction; that the amount alleged to be payable was only recoverable in the statutory manner, and that there was no power of imprisonment. Stated compendiously, that was the argument put forward. It would, if well founded, lead to a striking result, emancipating a vast number of people at once from the process that has been supposed hitherto to be the only effective one in the event of non-payment of rates. The legislation on the subject must be looked at in order to determine the question. It appears that Jervis's Act (11 & 12 Vict. c. 43) did not apply to poor-rates, and that led to the passing of an Act in the following session which gave special powers in that respect. A special provision as to the recovery of rates is contained in s. 2 of that Act (12 & 13 Vict. c. 14), where the mode then in force of collecting the poor-rate had been followed. That mode was adopted here. By the Metropolis Local Management Act of 1855, s. 161, the other rates that are sought to be recovered in this case are placed in the same category for all purposes as the poor-rate, and are to be recovered in the same way; and, by 25 & 26 Vict. c. 82, the poor-rate and any number of local rates may be included in the same proceeding. The machinery which is provided by those Acts appears to me complete, and to have been faithfully used and followed out in this case. Then comes the Summary Jurisdiction Act, 1879; and it was held by the Court of Queen's Bench in *Reg.* v. *Price* (1) that the Act of 1879 did not apply to proceedings for the recovery of poor-rates, and for the excellent reasons that the Act contemplated the judicial order of magistrates for the recovery of money, and that in respect of a poor-rate the liability arose from the rating, and not from any order of the magistrates. Next came the Summary Jurisdiction Act, 1884. It might have been supposed, but for s. 10, that that Act was intended to affect the jurisdiction of magistrates in enforcing the payment of poor-rates. Sect. 10,

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however, carefully protects the old procedure. For certain purposes, proceedings before magistrates were treated as proceedings in courts of summary jurisdiction; but the leading enactment was qualified by this—that s. 10 protected and permitted the old procedure as to poor-rates, or any rate or sum the payment of which is not adjudged by the conviction or order of a court of summary jurisdiction. That being the position of things, it is perfectly clear that the owner of property rated to the relief of the poor, who has not appealed against the rate, is subject to the provisions of 12 & 13 Vict. c. 14—an Act carefully kept alive by all the subsequent Acts. If this were the case of an ordinary owner of property, there would be no question that the process of warrant of distress and commitment was still available; but it is said that this is a peculiar case. It is the case of a married woman who is the owner of house property, and is rated to the relief of the poor in respect of rents and profits received from her houses. It is said that in that capacity, though she does not pay these rates, she, nevertheless, cannot be proceeded against under 12 & 13 Vict. c. 14, and cannot, in default of sufficient distress, be sent to prison. The position taken was that the liability of the married woman was to be derived from the contract she had made under the statute which enables an owner in certain cases to compound, and that that contract could only be enforced now by some kind of civil process. The suggestion was that in respect of such property an equitable receiver might be appointed, and in that way the rates could be recovered; but in no other way was it suggested that they could be recovered. The husband clearly would not be liable. When we turn to the Poor Rate Assessment and Collection Act, 1869 (I assume the notices to have been given, as they appear to have been given, under ss. 3 and 4), there is no trace of anything like an agreement, or of anything that would relieve the married woman from liability to pay these rates. Notice is given by the owner to the parish officers, and an abatement is made in the amount of the rates. The real truth is, the statute gives the owner of property an indulgence which is for his own benefit. He collects the rates from the occupiers if he can, and upon his paying the rates whether the houses are vacant or not, it is arranged that there

shall be a considerable abatement. There appears to me no ground for saying that this married woman's liability arose out of a contract. It is said that no contract would be binding upon her personally; but, if that be the legal effect of suggesting that there was a contract in this case, the answer is that there was no contract.

Now, is there any authority for saying that a married woman, being the owner of property and being liable to be rated, is exempt from distress and imprisonment in default of payment? The learned counsel for the applicant is able to cite to us no authority for that proposition; and Mr. Poland's researches have left him equally without means of assisting us. I cannot entertain a doubt that the statute means that the owner of property rated to the relief of the poor and not paying the rate is liable to distress, and imprisonment in default of a sufficient distress. I know of no principle by which a married woman is exempt from imprisonment, which is what counsel for the applicant insists that we ought, for the first time, to declare to be the law of England. Therefore, the only grounds upon which this application is made entirely fail. The cases cited by the counsel for the applicant do not, in my opinion, affect the points before us. Magistrates, when dealing with the poor-rate, or with rates placed in the same position as the poor-rate, must follow s. 10 of the Act of 1884, which carries them back to the old procedure. For these reasons, it seems to me the application must be refused.

KENNEDY, J. I agree. With regard to the matter which has been first dealt with by my brother Mathew, he has gone through the statutes affecting the question, and it is needless for me to say more than that, notwithstanding all the argument we have heard to the contrary, it is reasonably clear that the point taken is not good. The only point, in my view, worthy of consideration was one on which there seems to be no authority. The question is, whether or not, by virtue of Mrs. Allen being a married woman, she is to escape the liability to which, if she were not a married woman, it seems to me she would, as owner of the property, be clearly subject. It was suggested that this was a matter of contract; that the contract must be taken to be

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with regard to her separate estate; and, therefore, as laid down by the Court of Appeal in *Scott* v. *Morley* (1), there could be no remedy against her person. The argument was mainly based upon s. 3 of the Poor Rate Assessment and Collection Act of 1869. By s. 4 the parish has power to order that the owners of all rateable hereditaments to which s. 3 extends shall be rated to the poor-rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of the order. If the parish make that order, then under s. 4, sub-s. 1, the overseers "shall" rate the owners instead of the occupiers, and "shall" allow to them an abatement or deduction of 15 per cent. from the amount of the rate. That was done here. The rating of the owner is, therefore, made compulsory by the statute if the vestry make the order. It does, however, appear that, under sub-s. 2 of s. 4, Mrs. Allen could get an additional allowance if she signed a certain document; but her liability as owner was wholly apart from s. 3: it was imposed by s. 4. It seems to me that the argument put forward on her behalf fails, and that, in the absence of any authority for the proposition that she cannot be dealt with as any other owner would be, she is liable to the same procedure as if she were not a married woman. I am of opinion, therefore, that this application must be refused.

Application refused.

Solicitors for applicant: *Fred. Marriott & Co.*
Solicitor for vestry: *J. W. Barber.*

(1) 20 Q. B. D. 120.

W. A.

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The Mode of Citation of the Volumes of the LAW REPORTS, commencing January 1, 1895, will be as follows :—

In the First Series,

[1895] 1 Ch. [1895] 2 Ch. [1895] 3 Ch.

In the Second Series,

[1895] 1 Q. B. [1895] 2 Q. B. [1895] P.

In the Third Series,

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ARBITRATION—*Arbitrator—Agreement to refer to Named Arbitrator—Disqualification—Probable Bias—Staying Proceedings.*] The rule which applies to a judge or other person holding judicial office—namely, that he ought not to hear cases

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in which he might be suspected of a bias in favour of one of the parties—does not apply to an arbitrator, named in a contract, to whom both the parties have agreed to refer disputes which may arise between them under it. In order to justify the Court in saying that such an arbitrator is disqualified from acting, circumstances must be shewn to exist which establish, at least, a probability that he will in fact be biassed in favour of one of the parties in giving his decision.—Where, however, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employers in respect of the carrying out of the contract.—*Nuttall* v. *Mayor of Manchester* (8 Times L. R. 513) commented on. ECKERSLEY *v.* MERSEY DOCKS AND HARBOUR BOARD - - - - - C. A. 667

2. —— *Costs—Taxation—Costs of Reference—Cause referred for Trial—Special Referee—Costs of Reference included in Costs of Action—Order XXXVI., r. 50.*] An order of reference referred the whole cause to a special referee for trial under Order XXXVI.—The referee awarded that nothing was due from the defendants to the plaintiff, and directed and awarded that the defendants recover against the plaintiff the costs of the action and of the award:—*Held*, that the costs of the reference were included in the costs of the action, and therefore the defendants were entitled to recover against the plaintiff the costs of the reference. PATTEN *v.* WEST OF ENGLAND IRON, TIMBER, AND CHARCOAL COMPANY - 159

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Petition — Amendment — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (1) (*g*)—*Bankruptcy Rules*, 1886, 1890, *r.* 143—*Appendix of Forms, Form* 10.] Where the act of bankruptcy relied on by a petitioning creditor is failure to comply with a bankruptcy notice, the petition must state the date of the act of bankruptcy.—A bankruptcy petition stated that the debtor had failed to comply with a bankruptcy notice served upon him on a day named:—*Held*, that this statement was insufficient, and that the petition ought to state that the debtor had failed before a day, eight days later than the day on which the bankruptcy notice was stated to have been served, to comply with such notice:—*Held*, also, that the defect, in not duly stating the date of the act of bankruptcy, was not a ground for setting aside the receiving order, but ought to have been amended at the hearing of the petition, and could be amended by the Court on the hearing of an appeal from the receiving order. IN RE DUNHILL. EX PARTE DUNHILL - - - - 234

2. —— *Assets — Following Trust Money.*] Trustees of a fund, part of which was invested in debentures of a public company which were about to be paid off, authorized the bankrupts, a firm of private bankers with whom they had an account for the purposes of the trust, and who knew that the debentures belonged to the trust, to receive the proceeds of the debentures when paid off. The bankrupts having at the same time to pay a larger sum of money for other customers to the same company, did not receive the amount of the debentures in cash from the company, but gave their own cheque to the company for the amount due on balance, and credited the trust account with 1600*l.*, the full amount of the debentures paid off. Subsequently the bankrupts suspended payment, having at that time a balance exceeding 1600*l.* standing to the credit of their account with their own bankers, into which account they paid their daily receipts in their business:—*Held* (reversing the decision of Vaughan Williams, J.), that the doctrine of following trust money did not apply, as the money secured by the debentures had not been paid by the company to the bankrupts nor by the latter to their bankers and was incapable of identification, and that the balance to the credit of the bankrupts with their bankers was therefore part of their estate and was subject to administration under the Bankruptcy Act. *In re Hallett's Estate* (13 Ch. D. 696) considered. IN RE HALLETT & CO. EX PARTE BLANE C. A. 237

3. —— *Assets—Goods taken in Execution—Seizure—Possession by Sheriff for twenty-one Days—Payment out—Act of Bankruptcy — Notice — Title of Trustee in Bankruptcy—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 46—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11.] By s. 1 of the Bankruptcy Act, 1890, a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days:—*Held*, that to entitle an execution creditor to retain the benefit of his execution as against the trustee in bankruptcy, the execution must be completed either by sale or receipt of the amount of the levy before the sheriff has been in possession for twenty-one days, otherwise the title of the execution creditor may be defeated by the act of bankruptcy committed by the debtor under s. 1 of the Bankruptcy Act, 1890, of which the execution creditor must be taken to have had notice. *Ex parte Villars* (Law Rep. 9 Ch. 432) distinguished. FIGG *v.* MOORE BROTHERS - - - 690

4. —— *Assets—"Property of Bankrupt"—Undischarged Bankrupt trading without Knowledge of Trustee—Second Adjudication—Rights of Creditors to Property acquired by Trading—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54.] A debtor, having been adjudged bankrupt and not having obtained an order of discharge, traded without the knowledge of the trustee in the bankruptcy and thereby acquired property. On May 11, 1893, he executed a deed by which he assigned all his personal property to a trustee for the benefit of his creditors, and in consideration of the assignment the creditors thereby released him from their debts. On June 16, 1893, a receiving order was made against him, the act of bankruptcy being the execution of the deed; and on July 11 he was adjudged bankrupt a second time:—*Held*, reversing the decision of the Divisional Court, that the property so acquired by the bankrupt must be distributed as assets in the first bankruptcy.—*Ex parte Ford* (1 Ch. D. 521) followed.—*Cohen* v. *Mitchell* (25 Q. B. D. 262) explained and distinguished. IN RE CLARK. EX PARTE BEARDMORE - - C. A 393

5. —— *Deceased Debtor—Order for Administration of Estate in Bankruptcy—Jurisdiction—Petition served before Legal Personal Representative appointed—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s* 125.] An order under s. 125 of the Bankruptcy Act, 1883, for the administration in bankruptcy of the estate of a deceased debtor may be made upon a petition served before the grant of probate or letters of administration, if, at the time of the making of the order, there is a duly constituted legal personal representative of the deceased before the Court. IN RE SLEET. EX PARTE SLEET - - - C. A. 797

6. —— *Evidence—Discovery of Debtor's Property—Private Examination—Application to take Depositions off File—"Proceeding"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 27—*Bankruptcy Rules*, 1886, *r.* 12.] Depositions taken in a bankruptcy at a private examination under s. 27 of the Bankruptcy Act, 1883, are a "proceeding of the Court" within rule 12 of the Bankruptcy Rules, 1886, and ought to be placed on the file of proceedings in the bankruptcy.—Application by a bankrupt to have depositions so taken removed from the file refused. IN RE BEALL. EX PARTE BEALL - - - - - C. A. 135

7. —— *Examination—Public Examination of Bankrupt—Order to file account of Bankrupt's dealings in a Business alleged to have been carried on by him under another name—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 17—*Bankruptcy Rules*, 1886, *rr* 6, 338.] At the public examination of an undischarged bankrupt, he was ques-

BANKRUPTCY—*continued.*

tioned about a business which it was alleged that he had, since the date of the receiving order, been carrying on under a name not his own. He asserted that this business was not his, but was his wife's, and that he had only acted as her clerk. The registrar did not believe the bankrupt's statements, and, on the application of the official receiver, ordered the bankrupt to file an account of his dealings in the business in question. This order was made without any notice to the bankrupt's wife, who was not present:—*Held*, that the registrar had jurisdiction to make the order; that it did not amount to a final adjudication upon the title to the business; and that, if an application were made to the Court to commit the bankrupt for disobedience to the order, it would still be open to him to prove that the business belonged to his wife. IN RE CRONMIRE. EX PARTE CRONMIRE - - - C. A. 246

8. —— *Partnership—Assets—Execution levied against Firm—Bankruptcy of one Partner—Right of Trustee to Proceeds of Levy—Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 11.] By s. 11, sub-s. 2, of the Bankruptcy Act, 1890, where the goods of a debtor are sold under an execution in respect of a sum exceeding 20*l.*, the sheriff shall deduct his costs of the execution from the proceeds of sale, and retain the balance for fourteen days; and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against him, the sheriff shall pay the balance to the official receiver or trustee, who shall be entitled to retain the same as against the execution creditor.—Execution in respect of a sum exceeding 20*l.* was levied against a firm by seizure and sale of the partnership goods. Within fourteen days from the sale one of the partners presented his petition in bankruptcy, and a receiving order was made against him, due notice of the petition being given to the sheriff:—*Held*, that s. 11, sub-s. 2, did not apply, and that the official receiver was not entitled as against the execution creditors to the net proceeds of sale in the hands of the sheriff. DIBB *v.* BROOKE & SONS - - - - - - - 338

9. —— *Petition—Final Judgment—Non-payment after Service of Bankruptcy Notice—Refusal to make Receiving Order—Second Bankruptcy Notice in respect of same Judgment Debt—"Res judicata"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7.] Upon the hearing in a county court of a bankruptcy petition against a judgment debtor, founded on his non-compliance with a bankruptcy notice served upon him by the judgment creditor, the registrar inquired into the consideration of the debt for which judgment had been obtained, and, being of opinion that it did not constitute a good petitioning creditor's debt, refused to make a receiving order:—*Held*, by the Court of Appeal, that the decision of the registrar did not operate as res judicata with respect to the sufficiency of the petitioning creditor's debt, and did not therefore prevent the creditor from serving another bankruptcy notice, and obtaining a receiving order in respect of the same judgment debt. IN RE VITORIA. EX PARTE VITORIA [C. A. 387

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10. —— *Practice—Appeals from County Courts—Appeal from Incidental Order of Judge of High Court, to what Divisional Court Appeal should be brought—Bankruptcy Appeals (County Courts) Act*, 1884 (47 & 48 *Vict. c.* 9), *s.* 2—*Bankruptcy Rules*, 1886 *and* 1890, *r.* 134A.] Where the judge of the High Court for the time being exercising bankruptcy jurisdiction refuses to extend the time within which the official receiver should advertise a receiving order made in the county court and under appeal, an appeal from the judge's decision ought to be brought before a Divisional Court constituted to hear appeals from orders of county courts in bankruptcy matters. IN RE DUNHILL. EX PARTE WILSON - - - - - 554

11. —— *Secured Creditor—Promissory Note—Guarantee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 168.] H. & Co. lent a sum of money, receiving from the borrower a promissory note for the amount of the loan, together with the guarantee of a company, who thereby undertook to pay "to H. & Co., or the holders of the promissory note for the time being," the amount of the note if not paid at maturity. H. & Co. indorsed the promissory note, and handed it, together with the guarantee, to the appellants, their bankers, who gave them credit for the full amount of the note. The note was dishonoured at maturity, and H. & Co. became bankrupts. The appellants sought to prove in the bankruptcy as unsecured creditors for the amount due to them by H. & Co.:—*Held* (reversing the decision of Vaughan Williams, J.), that all the beneficial interest in the guarantee must be taken to have passed to the appellants, so that they were not "persons holding a mortgage, charge or lien on the property of the debtors, or any part thereof"; that they were therefore not secured creditors in respect of the contract of guarantee within the meaning of s. 168 of the Bankruptcy Act, 1883, and were entitled to prove as unsecured creditors for the full amount of their debt without deducting the value of the guarantee. IN RE HALLETT & CO. EX PARTE COCKS, BIDDULPH & CO. [C. A. 255

12. —— *Trustee, Appointment of—Objection by Board of Trade—Notification to High Court—Right of Appeal from Decision of High Court—Locus standi—"Person aggrieved"—One Trustee appointed of Estates of Two Bankrupts—Conflicting Interests—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 21, 104.] By s. 21 of the Bankruptcy Act, 1883, (2.) the Board of Trade, if satisfied with the security given by the person appointed by the creditors to be trustee of the property of a bankrupt, "shall certify that his appointment has been duly made, unless they object to the appointment on the ground that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally." And (3.) "Where the Board make such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity."—*Held*, that an appeal lies to the Court

BANKRUPTCY—*continued.*

of Appeal from such a decision of the High Court, and that, if the High Court decides that the objection is invalid, the Board of Trade are "aggrieved" by the decision, and may appeal against it.—E. having been adjudicated a bankrupt, the creditors appointed G. to be trustee in the bankruptcy. L. was afterwards adjudicated a bankrupt, and the creditors appointed G. to be trustee. G. was a creditor of E. for 3000*l.*, and he was also a creditor of L. for 400*l.* The principal asset of L. consisted of a property as to a moiety of which E. asserted that L. was a trustee for him. L. repudiated this claim. The Board of Trade certified that G. had been duly appointed trustee of E.'s estate; but they objected to his appointment as trustee of L.'s estate, on the ground, "that his connection with or relation to L. and his estate makes it difficult for him to act with impartiality in the interests of the creditors of the bankrupt generally." The objection was notified to the High Court under s. 21 (3):—*Held*, by the Court of Appeal, reversing the decision of Vaughan Williams, J., that, inasmuch as, if G. were appointed trustee of both the estates, there would be a serious conflict between his interest as a creditor of E. and his duty as trustee of L.'s estate, the objection of the Board of Trade was valid. IN RE LAMB. EX PARTE BOARD OF TRADE - - - - - C. A. 805

13. —— *Undischarged Bankrupt—Offences—"Obtaining Credit"—Intent to Defraud—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 31—*Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 18.] By the Bankruptcy Act, 1883, s. 31, "Where an undischarged bankrupt who has been adjudged bankrupt under the Act obtains credit to the extent of twenty pounds or upwards from any person, without informing such person that he is an undischarged bankrupt, he shall be guilty of a misdemeanour":—*Held*, that an intent to defraud is not a material ingredient of the offence created by the section. THE QUEEN *v.* DYSON [C. C. R. 176

14. —— *Undischarged Bankrupt—Mortgage of Interest by Undischarged Bankrupt—Sale by Mortgagees—Power of Court to Restrain Sale.*] An undischarged bankrupt mortgaged a contingent reversion to which he was entitled. The mortgagees, being unable to obtain payment of the mortgage-debt, put up the reversion for sale, subject to the rights of the trustee and of the creditors under the bankruptcy. The trustee thereupon obtained from the judge of the county court having jurisdiction in the bankruptcy a perpetual injunction restraining the mortgagees from proceeding with such sale:—*Held*, that the county court judge had no jurisdiction to grant such an injunction. IN RE EVELYN. EX PARTE GENERAL PUBLIC WORKS AND ASSETS COMPANY, LIMITED - - - - - - 302

BIAS—Arbitrator—Agreement to refer to named arbitrator—Disqualification—Staying proceedings - - - - 667
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BILL OF EXCHANGE—*Alteration—Stamp Sufficient to Cover Amount of Bill after Alteration—Negligence—Estoppel.*] A bill of exchange for 500*l.* was after acceptance fraudulently altered by the drawer into a bill for 3500*l.* The stamp upon which the bill was drawn was sufficient to cover the larger amount; but the bill, when accepted, was not in other respects so drawn as to make its acceptance in that form a negligent act on the part of the acceptor. In an action against the acceptor by a bonâ fide holder for value:—*Held*, that the mere fact that the defendant accepted the bill drawn on a stamp of a higher value than it need have borne was not evidence of such negligence on his part as to estop him from setting up the subsequent alteration of the bill as a defence to the action:—*Held*, further, that the bill did not by reason of the alteration become a new bill requiring a fresh stamp. SCHOLFIELD *v.* EARL OF LONDESBOROUGH - - - 660

2. —— *Dishonour—"On the last Day of Grace"—Notice of Dishonour—Accruer of Cause of Action—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 14, 47.] By the Bills of Exchange Act, 1882, s. 14, sub-s. 1, a bill of exchange is due and payable "on the last day of grace":—*Held*, that when payment of a bill of exchange is refused by the acceptor at any time on the last day of grace, the holder, though he is entitled at once to give notice of dishonour to the drawer and the indorsees, has no cause of action against either the acceptor or the other parties to the bill until the expiration of that day.—An action brought by the holder against the acceptor on the last day of grace must be dismissed as premature.—*Wells* v. *Giles* (2 Gale, 209) approved and followed. KENNEDY *v.* THOMAS - C. A. 759

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BILL OF SALE—*Entry of Satisfaction—Affidavit of Verification—Order* LXI., *r.* 26—*Central Office Practice Rules, r.* 25.] The affidavit verifying the signature and consent of the person entitled to the benefit of a bill of sale to the entry of satisfaction of the bill of sale need not be made by a solicitor. IN RE A BILL OF SALE. WHITE TO RUBERY - - - - - 923

2. —— *Registration—Sale of Goods—Receipt for Purchase-money—Possession—Husband and Wife—Separate Estate of Wife—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8.] A wife, who had separate estate, agreed to purchase from her husband some furniture and other personal chattels belonging to him, which were in the house in which she lived with him. She stipulated that a receipt for the purchase-money should be given to her, and instructed her solicitor to draw the receipt. After the purchase-money had been paid to the husband he signed a receipt which the wife's solicitor had prepared. This document acknowledged the receipt from the wife of the agreed sum, as the purchase-money "for all my furniture, plate, &c., which I hereby acknowledge are now absolutely her property." There was no formal delivery of the goods by the husband to the wife, but they remained, as they had pre-

BILL OF SALE—*continued.*

viously been, in the house in which the husband and the wife were living together. She subsequently sent part of the goods to her own bankers, and the remainder were afterwards taken in execution by a judgment creditor of the husband. In an interpleader issue between the wife and the execution creditor:—*Held*, that the receipt, notwithstanding the words at the end of it, did not form part of the transaction passing the property in the goods to the wife, but that the property had passed to her by the prior and independent bargain, and that consequently the receipt did not require registration under the Bills of Sale Act, 1878, and the wife was entitled to the goods as against the execution creditor:—*Held*, by Lord Esher, M.R., and Davey, L.J. (Lopes, L.J., expressing no opinion on this point), that the wife had a sufficient possession of the goods to take the case out of the Act, for the situation of the goods being consistent with their being in the possession of either the husband or the wife, the law would attribute the possession to the wife who had the legal title. RAMSAY *v.* MARGRETT [C. A. 18

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CANAL COMPANY—*Right to support for Canal—Mines under or near Canal—Compensation for not working Mine—Apprehended Danger to Canal from working of Mine—Right of Action for Injury to Canal—Undertaking by Canal Company not to Sue.*] By a special Act of Parliament, by which the defendants were empowered to make a canal, it was provided that the right of the owners of the lands, on or through which the canal was to be made, to mines and minerals should be reserved, with power to work the same, not thereby injuring the canal. It was further provided that, if the owners should in working such mines work near to or under the canal, so as in the opinion of the canal company to endanger or damage the same, or in the opinion of the owners of the mines to endanger or damage the further working of the same, it should be lawful for the company to treat and agree with the owners for all such minerals as might be thought proper to be left for the security of the canal; and, in case they should not agree, then a jury should be summoned to assess what satisfaction such owners ought to receive from the company on being restrained from working such minerals.—The plaintiffs, who were owners of coal-mines under and near the defendants' canal, gave to the defendants a notice to treat under the abovementioned provisions for the satisfaction to be made to them in respect of coal proper to be left for the security of the canal, and, the defendants taking no steps in the matter, brought an action for a declaration that they were entitled to have such satisfaction assessed and paid to them under

CANAL COMPANY—*continued.*

the Act. This action was referred for trial to a referee, who found that the working of the mines under and near the canal would not injure the mines, but would cause a subsidence of the canal, which would not interfere with the navigation of the canal, but would necessitate slight repairs to towing-paths, &c. The defendants offered to undertake that they would not object to the working of the coal under or near the canal, and would not make any claim against the plaintiffs in respect of damage that might be done to the canal, towing-paths, &c., by such working, but would at their own expense repair the same:—*Held*, that, upon the defendants' giving such an undertaking, the plaintiffs were not entitled to have satisfaction ascertained and paid to them for coal to be left for the security of the canal under the above-mentioned provisions. CHAMBER COLLIERY COMPANY *v.* COMPANY OF PROPRIETORS OF ROCHDALE CANAL - - - C. A. 632

CARRIAGE ROAD — Repair — Metropolis — Necessity of works—Apportionment and recovery of expenses - - 1
See METROPOLIS. 6.

CARRIER—Railway and Canal Commission—"Reasonable facilities for the receiving, forwarding, and delivering of traffic" [45, 694
See RAILWAY AND CANAL COMMISSION. 1, 2.

CASE—Special case stated by justices—Transmission of case to Court—Lodging case in Crown Office - - - 349
See PRACTICE. 3.

CASES—*Allan* v. *Overseers of Liverpool* (Law Rep. 9 Q. B. 180) followed - - 352
See POOR-RATE. 2.

—— *Cambefort* v. *Chapman* (19 Q. B. D. 229) disapproved - - - - 101
See JOINT CONTRACTOR.

—— *Cohen* v. *Mitchell* (25 Q. B. D. 262) explained and distinguished - - - 393
See BANKRUPTCY. 4.

—— *Cook* v. *Ipswich Local Board* (Law Rep. 6 Q. B. 451) distinguished - 496
See LOCAL GOVERNMENT. 5.

—— *Drake* v. *Mitchell* (3 East, 251) followed [101
See JOINT CONTRACTOR.

—— *Drummond* v. *Sant* (Law Rep. 6 Q. B. 763) approved of - - - 648
See LIMITATIONS, STATUTE OF. 2.

—— *Faithfull* v. *Ewen* (7 Ch. D. 495) followed [180, 350
See SOLICITOR. 1, 2.

—— *Ford, Ex parte* (1 Ch. D. 521) followed 393
See BANKRUPTCY. 4.

—— *Gatty* v. *Fry* (2 Ex. D. 265) approved 715
See CHEQUE.

—— *Hallett's Estate, In re* (13 Ch. D. 696) considered - - - - 237
See BANKRUPTCY. 2.

—— *Hastings* v. *Pearson* ([1893] 1 Q. B. 62) distinguished - - - - 452
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—— *Hough* v. *Edwards* (1 H. & N. 171) questioned - - - - 180
See SOLICITOR.

—— *Mackay* v. *Bannister* (16 Q. B. D. 174) distinguished - - - 832
See COUNTY COURT. 6.

—— *Marsh* v. *Keating* (1 Bing. N. C. 198) followed - - - - 40
See PRINCIPAL AND AGENT.

—— *Nuttall* v. *Mayor of Manchester* (8 Times L. R. 513) commented on - 667
See ARBITRATION.

—— *Pharmaceutical Society* v. *Piper & Co.* ([1893] 1 Q. B. 686) approved - - 720
See PHARMACY ACTS.

—— *Reg.* v. *Hull Dock Co.* (18 Q. B. 325) distinguished and explained - - 69
See POOR-RATE. 5.

—— *Reg.* v. *Hunter* (10 Cox, 642) considered 173
See CRIMINAL LAW. 4.

—— *Reg.* v. *Kennedy* ([1893] 1 Q. B. 533) considered and explained - - 579
See LANDS CLAUSES ACTS.

—— *Reg.* v. *Lambourn Valley Ry. Co.* (22 Q. B. D. 463) explained - - - 512
See RAILWAY. 3.

—— *Reg.* v. *Marsham* ([1892] 1 Q. B. 371) explained - - - - - 1
See METROPOLIS. 6.

—— *Reg.* v. *Sowerby* ([1894] 2 Q. B. 173) distinguished - - - - - 766
See CRIMINAL LAW. 3.

—— *Scott* v. *Morley* (20 Q. B. D. 120) considered
See METROPOLIS. 5. [924

—— *Staley* v. *Overseers of Castleton* (5 B. & S. 505) distinguished - - - 372
See POOR-RATE.

—— *Stroud* v. *Wandsworth District Board of Works* ([1894] 1 Q. B. 64) affirmed 1
See METROPOLIS. 6.

—— *Summers* v. *Holborn District Board of Works* ([1893] 1 Q. B. 612) considered - 524
See METROPOLIS. 7.

—— *Taylor* v. *Kymer* (3 B. & Ad. 320) distinguished - - - - - 452
See FACTOR.

—— *Thomas* v. *Cook* (8 B. & C. 728) approved of and followed - - - 885
See GUARANTEE.

—— *Tompson* v. *Dashwood* (11 Q. B. D. 43) disapproved of - - - - 54
See DEFAMATION.

—— *Villars, Ex parte* (Law Rep. 9 Ch. 432) distinguished - - - - 690
See BANKRUPTCY. 3.

—— *Wells* v. *Giles* (2 Gale, 209) approved and followed - - - - 759
See BILL OF EXCHANGE. 2.

—— *Wildes* v. *Dudlow* (Law Rep. 19 Eq. 198) approved of and followed - 885
See GUARANTEE.

CATTLE—Injury to—Poisonous tree near boundary of field - - - 281
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CHARGING ORDER—Lien—Solicitor—Assignment of judgment debt—Priority
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CHEQUE—*Post-dated Cheque—Admissibility in Evidence—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 4, 38—*Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 13, 73.] A post-dated cheque, stamped as a cheque, is admissible in evidence in an action brought, after the date of the cheque, by the holder, since, under the Stamp Act, 1891, the test of admissibility is whether the instrument appears, when tendered in evidence, to be sufficiently stamped.—*Gatty* v. *Fry* (2 Ex. D. 265) approved. ROYAL BANK OF SCOTLAND *v.* TOTTENHAM - - - - C. A. 715

—— Joint contractor—Cheque given by one joint contractor for liability on contract—Unsatisfied judgment on cheque—Action against joint contractor on original contract—Res judicata - 101
See JOINT CONTRACTOR.

—— Signature by procuration—Limited authority - - - - - - 40
See PRINCIPAL AND AGENT.

—— Trover—Conversion—Crossed cheque—Banker collecting and handing over proceeds - - - - 157
See TROVER.

CHURCH RATE—Assessment—"Full annual rent or value"—Rateable value - 90
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COLLISION—Insurance (Marine)—Proximate cause of loss of ship—Injury—Concurrent cause—Towage - - 548
See INSURANCE (MARINE).

COMPANY—*Voluntary Winding-up—Stay of Proceedings in Action—Costs—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 85—*Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.] Where an order is made staying an action brought against a company which is being voluntarily wound up, the Court or judge has power in a proper case to order the plaintiff to pay the costs of the application. FREEMAN *v.* GENERAL PUBLISHING COMPANY - - - - - - - 380

—— Winding-up—County court—Jurisdiction—Writ of fieri facias - - 96
See COUNTY COURT. 4.

COMPENSATION—Canal company—Mines under or near canal—Compensation for not working mine—Apprehended danger to canal from working of mine - 632
See CANAL COMPANY.

—— Lands Clauses Acts—Determination of amount of compensation by justices—Taking part of land subject to lease—Interest less than a year in land taken, but greater than a year in adjoining lands - - - - - 579
See LANDS CLAUSES ACTS.

—— Minerals—Purchase by railway company of all subjacent strata except coal—Right of owner of coal to compensation before the commencement of working coal mine
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COMPENSATION—*continued.*

—— Tramway—County council—Purchase of undertaking—Terms of purchase—Valuation of tramway - - - 189
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CONTINUING OFFENCE—Metropolis—Management Acts—Height of buildings—Building erected on one side of new street—Continuance at prohibited height after notice - - - - 826
See METROPOLIS. 2.

CONTRACT—Infant—Insurance against accident—Exoneration of employer from liability—Contract for benefit of infant 482
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—— Infant—Railway—Passenger—Condition—Contract not for benefit of infant 65
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—— Married woman—Contract made before marriage—Personal liability - - 577
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CONVERSION—Crossed cheque—Banker collecting and handing over proceeds - 157
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CONVERSION OF REAL AND PERSONAL ESTATE—Revenue - - 150
See REVENUE.

COPYHOLD—*Implied Admittance—Acceptance of Rent by Lord after Change of Tenancy—Seizure quousque—Statutes of Limitations* (3 & 4 *Wm.* 4, *c.* 27; 37 & 38 *Vict. c.* 57).] The acceptance of quit-rents in respect of copyholds by the lord of a manor from a person paying them as heir or surrenderee amounts to or implies an admittance of such person as tenant of the copyholds if the lord knows that such quit-rents are paid by him as heir or surrenderee.—The Statutes of Limitations apply to a seizure quousque of copyholds by the lord of a manor, and the period fixed by those statutes begins to run from the time at which, after proclamation or notice, the heir has failed to come in and be admitted. ECCLESIASTICAL COMMISSIONERS FOR ENGLAND *v.* PARR C. A. 420

COSTS—Company—Voluntary winding-up—Stay of proceedings in action - - 360
See COMPANY.

—— County court—Action commenced in High Court—Payment of part of claim after action brought—Transfer of action as to residue to county court—Recovery of residue in county court - - 329
See COUNTY COURT. 2.

—— County court—Action in High Court—Balances not exceeding 50*l.*—Admitted set-off—Jurisdiction - - 861
See COUNTY COURT. 3.

—— County court—Appeal—Judge's note—Shorthand note—Practice of City of London Court - - - 437
See COUNTY COURT.

—— Forfeiture, Action for—Relief—Costs of lessor's solicitor and surveyor - 226
See LANDLORD AND TENANT.

—— Habeas Corpus—Jurisdiction to order payment of costs of application - 362
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—— Pauper—Suing in formâ pauperis—Plaintiff in default seeking indulgence—Power to impose terms as to payment of costs [37
See PRACTICE. 8.

—— Solicitor—Retainer in common law action—Refusal of solicitor to act further during pendency of action—Action for costs previously incurred—Entire contract - - - - - 306
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—— Taxation—Costs of reference—Cause referred for trial—Special referee—Costs of reference included in costs of action [159
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COSTS, SECURITY FOR—Plaintiff resident out of the jurisdiction—Action on foreign judgment - - - - - 30
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COTTON MILL—Stoppage of works through a strike—Poor-rate - - - 372
See POOR-RATE.

COUNTY COUNCIL—Tramway—Purchase of undertaking—Terms of purchase—Valuation of tramway - - 189
See TRAMWAY.

COUNTY COURT—*Appeal—Judge's Note—Costs—Shorthand Note—Practice of City of London Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 121.] On the hearing of an appeal from the City of London Court in a case tried with a jury, the appellant used a shorthand note of the evidence and the summing-up. A new trial was ordered on the ground of misdirection. The practice of the City of London Court, as stated by the judge, is that the Corporation employ a shorthand writer to take a note of the proceedings, and the parties can obtain a transcript of the shorthand note on payment.—On an application by the appellant for the costs of the shorthand note:—*Held*, that, as the case was one in which it was impossible to request the judge to make a note at the time when the point on which the appeal was decided arose, because the point did not arise until after the close of the summing-up, the judge was not bound, under s. 121 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), to furnish a copy of his note, and the appellant was therefore entitled to obtain and use the transcript of the shorthand note, and the costs ought to be allowed, but only the costs of so much of the note as was necessary, that in the present case a note of the evidence was necessary, but that as a general rule, in cases tried with a jury, where it is necessary to use a transcript of the shorthand note, only the costs of the note of the summing-up ought to be allowed. BARBER *v.* BURT - - - 437

2. —— *Costs—Action commenced in High Court—Payment of part of Claim after Action brought—Transfer of Action as to Residue to County Court—Recovery of Residue in County Court—Scale applicable to Taxation of Costs in County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.] In an action to recover 104*l.* the defendant, in pursuance of an order made upon an application by the plaintiff for leave to sign final judgment, paid 90*l.* to the plaintiff's solicitor, and the action as to the balance of 14*l.* was

COUNTY COURT—*continued.*

transferred to the county court; the 14*l.* was paid into court in the county court:—*Held*, that the plaintiff had recovered 104*l.* in the action, and was therefore entitled to have his costs in the county court taxed upon Scale C, applicable where the amount recovered exceeds 50*l.*, and not upon Scale A, which applies where less than 20*l.* is recovered. KEEBLE *v.* BENNETT - 329

3. —— *Jurisdiction—Balance not exceeding 50l.—Admitted Set-off—Admission by Plaintiff only—Costs of Action in High Court—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 12—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 57.] By Order LXV., r. 12, in actions founded on contract, in which the plaintiff recovers a sum not exceeding 50*l.*, he is entitled to no more costs than if he had sued in the county court, unless otherwise ordered.—By s. 57 of the County Courts Act, 1888, the county court has jurisdiction where the claim consists of a balance not exceeding 50*l.*, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff.—A special indorsement on a writ stated the total claim as 148*l.* 1*s.*, and gave credit "by payments on account and contra 25*l.*," reducing the claim to 123*l.* 1*s.* The plaintiff recovered 50*l.* only.—*Held*, that the set-off, being admitted on the writ by the plaintiff, and adopted and acquiesced in throughout by the defendant, was sufficient evidence to justify the conclusion that it was an admitted set-off within the meaning of s. 57, and the action could have been brought in the county court, and therefore the plaintiff was only entitled to costs on the county court scale. LOVEJOY *v.* COLE - - - - 861

4. —— *Jurisdiction—Company—Winding up—Powers of County Court Judge—Writ of Fieri Facias—Companies (Winding up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-s.* 6.] Although s. 1, sub-s. 6 of the Companies (Winding up) Act, 1890, gives to a county court having jurisdiction to wind up a company "all the powers of the High Court" in respect of such winding up, the county court has no power to issue a writ of fieri facias addressed to the sheriff of the county, for the purpose of enforcing, by execution, an order of that Court directing a person to pay moneys received by him on behalf of the company to the liquidator. IN RE BASSETT'S PLASTER COMPANY [96

5. —— *Jurisdiction—Remitted Action—Action for Unliquidated Damages—Indorsement of Amount of Claim upon Writ—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.] There is no power under s. 65 of the County Courts Act, 1888, to remit an action for unliquidated damages to a county court, even where the writ is indorsed with a claim for a specified sum. BASSETT *v.* TONG - - - - - - 332

6. —— *Jurisdiction—Remitted Action—Counter-claim for Unliquidated Damages—Power to order Trial in County Court—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 65.] An action of contract brought in the High Court for a sum not exceeding 100*l.*, to which a counter-claim for unliquidated damages is pleaded, can be ordered to be tried in the county court under s. 65 of the County Courts Act, 1888.—*Mackay* v. *Bannister* (16 Q. B. D. 174) distinguished. GUILFORD *v.* LAMBETH - - - - - 832

7. —— *Practice—Solicitor—Clerk—Right of Audience—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 72.] Where a solicitor, retained by a party to an action in the county court, instructs his clerk to appear and conduct the proceedings in court on the client's behalf, such clerk, although he be a duly qualified solicitor and has had the general management of the proceedings in the action for the client, is not "a solicitor acting generally in the action" for the client within the meaning of s. 72 of the County Courts Act, 1888, and is not entitled to address the Court without the leave of the judge. THE QUEEN *v.* JUDGE OF COUNTY COURT OF OXFORDSHIRE 440

—— Bankruptcy appeals—Appeal from incidental order of judge of High Court 554
See BANKRUPTCY. 10.

COUPON—Stamp—Bill of exchange - 142
See REVENUE. 3.

CRIMINAL LAW—*Cruelty to Animals—Domestic Animals—Caged Lions—The Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *ss.* 2, 29—*The Cruelty to Animals Act*, 1854 (17 & 18 *Vict. c.* 60), *s.* 3.] The respondent kept five full-grown lions in a cage, and gave for profit a public performance in which he entered the cage with a lady dancer, who danced whilst he, being armed with a whip and a strong pole, kept the lions in subjection. Afterwards one of them was made to jump over a board. Except in those respects the lions did not differ in any way from wild animals kept in confinement:—*Held*, that the lions were not "domestic animals" within the meaning of 12 & 13 Vict. c. 92, s. 29, and 17 & 18 Vict. c. 60, s. 3, and therefore that the respondent could not be convicted on an information charging him with cruelly treating them. HARPER *v.* MARCKS [319

2. —— *Extradition—Offence of a Political Character—Anarchist Outrages—Evidence of Accomplice—Corroboration—One Committal for two Offences—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *s.* 3, *sub-s.* 1.] A prisoner committed for extradition, on two charges of committing anarchist outrages in France, by causing explosions at a café and at certain barracks, applied for a writ of habeas corpus. The two charges were included in one committal:—*Held*, that if the charges had depended on the uncorroborated evidence of an accomplice (which was not the case), that would not be a ground for discharging the prisoner, for absence of corroboration was not conclusive in favour of a prisoner's right to acquittal, but the magistrate had a discretion as to whether the evidence was sufficient to justify a committal, that separate committals were not necessary, that the outrage at the barracks was not an offence of a political character, within the meaning of s. 3, sub-s. 1, of the Extradition Act, 1870, for to constitute a political offence there must be two or more parties in the State, each seeking to impose the government of their own choice on the other, which was not the case with regard to anarchist crimes, and therefore the prisoner was liable to extradition. IN RE MEUNIER - - 415

CRIMINAL LAW—*continued.*

3. —— *False Pretences—Form of Indictment—Evidence—Proof of Handwriting by Comparison—Skilled Witness*—28 & 29 *Vict. c.* 18, *s.* 8.] A count in an indictment for obtaining a cheque by false pretences charged that the defendant, by causing to be inserted in a newspaper a fraudulent advertisement [setting it out], did falsely pretend to the subjects of Her Majesty the Queen that [setting out the false pretence], by means of which last-mentioned false pretence he obtained from A. a cheque:—*Held*, that the count was good, although it did not allege that the false pretence was made to a particular person.—*Reg.* v. *Sowerby* ([1894] 2 Q. B. 173) distinguished.—By 28 & 29 Vict. c. 18, s. 8; "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute."—*Held*, that a witness giving evidence under this section need not be a professional expert, or a person whose skill in the comparison of handwritings has been gained in the way of his profession or business. THE QUEEN v. SILVERLOCK - - C. C. R. 766

4. —— *False Pretences—Sufficiency of Indictment.*] An indictment for obtaining, or attempting to obtain, money by false pretences must contain averments stating the person to whom the false pretence was made, and the person from whom the money was obtained or attempted to be obtained.—The form of indictment in *Reg.* v. *Hunter* (10 Cox, 642) held bad. THE QUEEN v. SOWERBY - - - - C. C. R. 173

5. —— *Practice—Previous Conviction—Misdemeanour—Uttering Counterfeit Coin—Indictment for Felony—The Coinage Offences Act*, 1861 (24 & 25 *Vict. c.* 99), *ss.* 9, 12, 37.] By 24 & 25 Vict. c. 99, s. 9, a person who utters counterfeit coin is guilty of a misdemeanour, "and being convicted thereof" is liable to imprisonment. By s. 12, a person who has been convicted of a misdemeanour under s. 9, and afterwards commits a misdemeanour mentioned in that section, is guilty of felony, "and being convicted thereof" is liable to penal servitude. By s. 37, a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence is made sufficient evidence of the previous conviction:—*Held*, that the expression "convicted," as used in ss. 9 and 12, must be taken to refer only to the finding of a verdict of guilty or a plea of guilty, and not to include the sentence or judgment of the Court; and that, therefore, upon the trial of an indictment for felony under s. 12, a previous conviction under s. 9 was sufficiently proved by the production of a certificate which shewed that the prisoner had been released upon finding a recognizance to come up for judgment when called upon. THE QUEEN v. BLABY - C. C. R. 170

CRUELTY TO ANIMALS—Criminal law—Domestic animals—Caged lion - 319
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DAMAGES—Measure of—Lessor and lessee—Damage by vibration caused by lessor on adjoining land - - - 836
See LANDLORD AND TENANT. 3.

DANGEROUS STRUCTURE—Metropolis Building Acts—Jurisdiction of magistrate—Order for demolition - - - 522
See METROPOLIS.

DEFAMATION—*Libel—Privileged Occasion—Absence of Interest or Duty in Person to whom defamatory Statement is made—Belief of Defendant in existence of such Interest or Duty.*] In order that the occasion upon which a defamatory statement is made may be privileged, it is necessary that the person to whom such statement is made, as well as the person making it, should have an interest or duty in respect of the subject-matter of such statement. It is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has such an interest or duty.—*Tompson* v. *Dashwood* (11 Q. B. D. 43) disapproved of. HEDDITCH v. MACILWAINE - - C. A. 54

DEPOSITION — Bankruptcy — Discovery of debtor's property—Private examination—Application to take depositions off file—"Proceeding" - - 135
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DISQUALIFICATION—Arbitrator—Probable bias—Staying proceedings - - 667
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EMPLOYERS' LIABILITY ACT—Infant—Contract for benefit of infant—Insurance against accident—Exoneration of employer from liability - - 482
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ESTOPPEL—Bill of exchange—Alteration—Negligence - - - - 660
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—— Judgment — Bankruptcy — Non-payment after service of bankruptcy notice—Refusal to make receiving order—Second bankruptcy notice in respect of same judgment debt - - 387
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—— Judgment—Highway—Liability to repair [108
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EVIDENCE—Bill of exchange—Stamp—Post-dated cheque—Admissibility in evidence - - - - 715
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—— Criminal law—Accomplice—Corroboration [415
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—— Handwriting—Comparison of - - 766
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—— Practice—Evidence taken in other causes—Admissibility of such evidence in subsequent action - - - 801
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—— Previous conviction—Criminal law—Practice - - - - - 170
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—— Revenue—Excise—Proceedings to recover penalties—Officer of inland revenue—Proof of authority to take proceedings
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—— Witness called by judge—Cross-examination - - - - - 316
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EXAMINATION—Bankrupt—Business alleged to have been carried on by bankrupt under another name—Order to file accounts - - - - 246
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—— Bankruptcy—Discovery of debtor's property—Private examination—Application to take depositions off file - - 135
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EXECUTION—Bankruptcy—Execution levied against firm—Bankruptcy of one partner - - - - 338
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—— Company—Winding-up—Writ of fieri facias—County court—Jurisdiction - 96
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—— Seizure—Possession by sheriff for twenty-one days—Payment out—Act of bankruptcy - - - - 690
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EXTRADITION—Criminal law—Offence of a political character—Anarchist outrages
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FACTOR—*Dispositions by Sellers and Buyers of Goods—Hiring Agreement—Delivery by Hirer to Auctioneer for Sale—Receipt and Sale in good Faith and without Notice—Validity of Delivery or Transfer—"Delivery under any Agreement for Sale"—"Agreement for Sale, Pledge, or other Disposition"—Factors Act*, 1889 (52 & 53 *Vict.* c. 45), s. 9.] By the Factors Act, 1889, s. 2, a sale, pledge, or other disposition, by a mercantile agent in the course of business, of goods of which he is in possession with the consent of the owner, is valid, provided the person taking under the disposition acts in good faith and without notice of want of authority.—By s. 9, "Where a person having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods . . . . the delivery or transfer by that person . . . . of the goods, ... under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien

FACTOR—*continued.*

or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods . . . . with the consent of the owner."—The plaintiffs let a piano by a hiring agreement, the piano on payment of all the instalments to become the property of the hirer. The hirer delivered the piano to the defendant, an auctioneer, to be sold by auction, some instalments being then unpaid. The defendant received the piano in good faith, without notice of the plaintiffs' rights, sold it, and paid the proceeds to the hirer.—In an action for conversion of the piano:—*Held*, that the hirer had agreed to buy, and had obtained, with the consent of the plaintiffs, possession of, the piano, that the delivery by the hirer to the defendant had the same effect as if the hirer were a mercantile agent, that the words "delivery under any agreement for sale" were not confined to delivery to the person receiving the goods pursuant to a sale by the person delivering them, that the words "agreement for sale, pledge, or other disposition" included a delivery of goods to be sold, by the person receiving, for the benefit of the person delivering, and therefore that the defendant was protected from liability by the—*Taylor* v. *Kymer* (3 B. & Ad. 320), and *Hastings* v. *Pearson* ([1893] 1 Q. B. 62), distinguished. SHENSTONE & Co. *v.* HILTON - - 452

2. —— *Sale of Goods, Agreement for—Factors Acts—Possession of Goods under Agreement to Purchase—Hire and Purchase Agreement—Disposition of Goods by Person having agreed to Purchase—Factors Act*, 1889 (52 & 53 *Vict. c.* 45), *s.* 9.] By the Factors Act, 1889, s. 9, where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods, the delivery or transfer by that person of the goods under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods with the consent of the owner.—By an agreement made between the plaintiff (thereinafter called the "owner") and B. (thereinafter called the "hirer"), it was witnessed that the "owner" agreed to let a pianoforte on hire to the "hirer," and the "hirer" agreed to pay the "owner" a monthly rent or "hire instalment" of ten shillings and sixpence, on the terms that, if the "hirer" should punctually pay a certain amount by a certain number of such monthly instalments as aforesaid, the instrument should become his property; but, unless and until such full amount was paid, it should remain the property of the "owner." It was provided by such agreement that, if the "hirer" did not duly perform the same, the "owner" might retake possession of the instrument, and that the "hirer" might terminate the hiring by delivering up the instrument to the "owner." Possession of the pianoforte having been given to B. under the agreement, after paying some of the instalments he pledged it with the defendant to secure an

FACTOR—*continued.*
advance of money:—*Held* (reversing the judgment of a Divisional Court), that by the agreement B. had agreed to buy the piano within the meaning of s. 9 of the Factors Act, 1889. HELBY v. MATTHEWS - - - - C. A. 262

FALSE PRETENCES—Form of Indictment 766
See CRIMINAL LAW. 3.

—— Sufficiency of indictment - - 173
See CRIMINAL LAW. 4.

FIRE-PLUGS—Waterworks—Fixing and maintaining fire-plugs—Liability of local board - - - - 735
See WATERWORKS.

FOREIGN JUDGMENT—Action on—Plaintiff resident out of jurisdiction—Security for costs - - - - - 30
See PRACTICE. 9.

FORFEITURE—Re-entry—Bankruptcy of lessee—Relief of underlessee against forfeiture - - - - - 906
See LANDLORD AND TENANT. 2.

—— Relief—Breach of covenant to repair—Liability of underlessee for costs of lessor's solicitor and surveyor - - 226
See LANDLORD AND TENANT.

FRAUDS, STATUTE OF—Guarantee—Indemnity—Surety—Oral promise—Promise to answer for debt or default of another [885
See GUARANTEE.

FREIGHT—Insurance—Inception of risk 590
See INSURANCE (MARINE). 2.

GUARANTEE—*Indemnity—Surety—Oral Promise—Promise to answer for Debt or Default of another—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.] A promise by the defendant in consideration of the plaintiff accepting certain bills of exchange, to indemnify him from liability to make payments in respect of such bills, is not within s. 4 of the Statute of Frauds.—The defendant orally promised the plaintiff that, if he, the plaintiff, would accept certain bills for a firm in which the defendant's son was a partner, he, the defendant, would provide the plaintiff with funds to meet the bills:—*Held* (affirming the judgment of Mathew, J.), that this was a promise of indemnity and not of guarantee, and therefore not required by s. 4 of the Statute of Frauds to be in writing. —*Thomas* v. *Cook* (8 B. & C. 728) and *Wildes* v. *Dudlow* (Law Rep. 19 Eq. 198) approved of and followed. GUILD & Co. v. CONRAD - C. A. 885

HABEAS CORPUS—*Costs—Jurisdiction to order Payment—Supreme Court of Judicature Act*, 1890 (53 *& 54 Vict. c.* 44), *ss.* 4, 5.] Since the commencement of the Supreme Court of Judicature Act, 1890, the Court, when granting an application for a habeas corpus, has jurisdiction, by s. 5 of that Act, to order payment by the defendant of the costs of the application, and such jurisdiction is not affected by the provisions of s. 4. THE QUEEN v. JONES - - - 382

HANDWRITING—Comparison of—Evidence [766
See CRIMINAL LAW. 3.

HARBOUR — *Obstruction to Navigation — Discharge of Solid Matter in Suspension*—54 *Geo.* 3, *c.* 159, *s.* 11.] By 54 Geo. 3, c. 159, s. 11, if the owner or master of any ship or any person working any quarry, mine or pit, "or any other person or persons whatsoever shall cast, throw, empty or unlade" either from such ship or from the shore "any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth" into any port, harbour, or navigable river "so as to tend to the injury or obstruction of the navigation thereof, or in any place or situation on shore where the same shall be liable to be washed into the sea" or into any port, harbour, or navigable river, either by tides, storms, or floods, he shall be liable to a penalty. —The appellants in the course of their business as alkali manufacturers, discharged a large quantity of water containing solid matter in suspension through a drain into a tidal brook which flowed into a navigable river. The solid matter was carried down by the tide and deposited in the river, but it was not alleged or shown that it tended to the injury or obstruction of the navigation of the river:—*Held*, that the appellants were rightly convicted under the latter part of the section. UNITED ALKALI COMPANY v. SIMPSON - - - - 116

—— Poor-rate — Harbour dues — Rateability — Dues unconnected with occupation of land by commissioners - 293, 675
See POOR-RATE. 3, 4.

HIGHWAY—*Exemption from Highway Rate—Liability to repair ratione tenuræ—Alteration of Highway—Estoppel—Res judicata—Facts not before Court on previous occasion—Highway Act*, 1835 (5 *& 6 Wm.* 4, *c.* 50), *s.* 33.] The appellants had from time immemorial repaired a certain highway ratione tenuræ, and had in consequence been exempt from contributing to the repair of other highways in the district. In 1782 the highway was placed under the control of turnpike trustees, who materially altered its nature and course; but on the expiration of the turnpike trust in 1862 the appellants, believing that they were still liable to do so, continued to repair the highway. In 1866 the Court of Queen's Bench decided (Law Rep. 1 Q. B. 218) that the appellants were not liable to be rated for the repair of highways in the district; but the fact of the alteration of the highway by the turnpike trustees was not brought to the attention of the Court. In 1892 the highway was declared a main road, and the appellants thereupon ceased to repair it. The question having arisen whether they were liable to contribute to a rate for the repair of the highways in the district:—*Held*, that their exemption from such a rate depended on their liability to repair the highway ratione tenuræ, and that both had come to an end on the alteration of the highway by the turnpike trustees; and, further, that the former decision of the Queen's Bench did not make the matter res judicata, since the material fact of the alteration of the highway had not been brought to the attention of the Court. HEATH v. OVERSEERS OF POOR OF TOWNSHIP OF WEAVERHAM - 108

2. —— *Surveyor—Liability—Debt incurred by Surveyor's Predecessor—Highway Act*, 1835 (5 *& 6 Wm.* 4, *c.* 50).] An action does not lie against a

HIGHWAY—*continued.*
surveyor of highways, appointed under the Highway Act, 1835, for the price of materials sold or supplied to his predecessor for the repair of the highways in the parish, where such predecessor has died insolvent after having received from the parish moneys sufficient to pay for such materials. FRODINGHAM IRON AND STEEL COMPANY *v.* BOWSER - - - - 791

HIRE AND PURCHASE AGREEMENT—Dispositions by sellers and buyers of goods—Delivery by hirer to auctioneer for sale—Receipt and sale in good faith and without notice—Validity of delivery or transfer - - - - 452
See FACTOR.

—— Factors Acts—Possession of goods under agreement to purchase—Disposition of goods by person having agreed to purchase - - - - 262
See FACTOR. 2.

HUSBAND AND WIFE—*Married Woman—Contract made before Marriage—Personal Liability on.*] The personal liability of a married woman at common law upon contracts made by her before marriage is not taken away by the Married Women's Property Act, 1882. ROBINSON, KING & Co. *v.* LYNES - - - - 577

2. —— *Married Woman—Judgment against—Execution limited to Separate Estate—Restraint on Anticipation—Arrears of Income becoming due after Judgment—Receiver, Sequestration, Charging Order—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 1, 2, 3, 4; *s.* 19.] Where a married woman has separate estate restrained from anticipation, the Married Women's Property Act, 1882, does not enable a judgment to be enforced against arrears of income to which the restraint applies, accruing due after the date of the judgment, either by the appointment of a receiver, by sequestration, by a charging order, or by any kind of process. HOOD BARRS *v.* CATHCART - - - - C. A. 559

—— Sale of goods by husband to wife—Possession—Bills of Sale Act - - 18
See BILL OF SALE. 2.

INDEMNITY—Statute of Frauds—Oral promise—Promise to answer for debt or default of another - - - - 885
See GUARANTEE.

INDICTMENT—Form of—False pretences 766
See CRIMINAL LAW. 3.

INFANT—*Contract not for Benefit of—Agreement that Railway Company shall not be liable for Negligence towards Infant Passenger.*] The plaintiff, a boy between thirteen and fourteen years of age, who was employed at a colliery, entered into an agreement with a railway company by which, in consideration of their permitting him to travel by their railway to and fro between the place where he lived and the colliery, under a certain special arrangement made between the colliery proprietor and the company, he agreed that neither he nor his executors or administrators or relatives should have any claim against the company by reason of any accident, injury, or loss, which might happen to him or his property while upon their railway, notwithstanding that such accident, injury, or loss was occasioned by the negligence of the company or any of their officers or servants; and further, that he, his executors and administrators, would indemnify the company from and against all loss, costs, damages, and expenses which they might incur by reason of any such accident, injury, or loss to him or his property, or by reason of any claim or legal proceedings instituted or taken by him or them against the company or any of their officers or servants in respect thereof:—*Held*, that this agreement was so much to the detriment of the plaintiff as to be unfair to him as being an infant, and, therefore, it was not binding upon him. FLOWER *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - - C. A. 65

2. —— *Contract of Service—Contract for Benefit of Infant—Insurance against Accident—Exoneration of Employer from Liability—Practice—Appeal in formâ pauperis—Proceedings on Crown Side of Queen's Bench Division—Appeal from County Court—Rules of Supreme Court,* 1883, *Order* XVI., *r.* 22; *Order* LXVIII., *rr.* [illegible].] The plaintiff entered the service of the defendants, a railway company, as a porter, when under age, and agreed to become a member, and to be bound by the rules, of an insurance society, formed among the employés of the defendants, towards the funds of which the defendants contributed. He at the same time signed an agreement by which he accepted the contribution and the advantages to which he might be entitled under the rules of the society, in lieu of any claims against the defendants under the Employers' Liability Act. The rules of the society covered all accidents, except such as arose wilfully or by gross negligence on the part of the member, and were not restricted to accidents for which the employers would be liable. The rules contained provisions for the limitation of the amount of temporary or permanent relief, these being less than the limit that can be recovered under the Employers' Liability Act; forfeiture of benefits in default of notice of an accident; forfeiture of claims for various breaches of the regulations, or in case of criminal misconduct; and reference of disputes to arbitration. The plaintiff sustained an injury by reason of an accident, and sued the railway company. At the time of the accident and of action brought the plaintiff was still an infant:—*Held*, affirming the judgment of the Queen's Bench Division, that the agreement to become a member of the insurance society, and to be bound by its rules, was a part of a contract of service which it was competent for an infant to enter into:—*Held*, also, that the contract was an answer to the action, for the restrictive rules were such as an insurance society might reasonably make for the protection of their funds, and the contract taken as a whole was for the benefit of the plaintiff and binding on him.—The rule of practice that a party to proceedings on the Crown side of the Queen's Bench Division cannot be admitted to proceed as a pauper is only applicable to cases

INFANT—*continued.*
between the Crown and a subject, and therefore does not apply to appeals from a county court, although they are entered in the Crown paper for hearing. CLEMENTS *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - C. A. 482

INFERIOR COURT—Liverpool Court of Passage—Appeal—Court of Appeal - 222
See LIVERPOOL COURT OF PASSAGE.

INJUNCTION—Bankruptcy—Mortgage of interest by undischarged bankrupt—Sale by mortgagees—Power of Court to restrain sale - - - - 302
See BANKRUPTCY. 14.

INSURANCE (MARINE)—*Collision—Proximate Cause of Loss of Ship—Injury—Concurrent Cause—Towage.*] A ship was insured against damage from collision with any object, but not against perils of the sea. The ship ran against a snag in a river, and, the collision causing a leak, the ship was anchored and the leak temporarily repaired, so that the ship was out of immediate danger. A tug was sent to tow the ship to the nearest dock for repairs; but the effect of the motion through the water was that the leak was opened again, and the ship began to sink, and was run aground and abandoned:—*Held*, that inasmuch as the injury to the ship remained throughout, the collision was the proximate cause of the damage, and that the loss of the ship was covered by the policy. REISCHER *v.* BORWICK - - - - C. A. 548

2. —— *Policy—Clause partly in Print and partly in Writing—Attachment of Policy.*] By a policy of marine insurance expressed to be on freight of meat "at and from Monte Video to any ports in the Rivers Plate (including the Boca) Parana or Uruguay, and thence to the United Kingdom," it was provided that the underwriters should "be liable for any loss occasioned by breaking down of machinery until final sailing of vessel," and that "the assurance shall commence upon the freight and goods from the loading of the said goods on board at Monte Video." The name "Monte Video" in the last-mentioned clause was in writing, the rest of the clause being in print. After arrival at Monte Video, where outward cargo was discharged, the ship proceeded up to the Boca, where, before she received any meat on board, her refrigerating machinery broke down to such an extent as to render it necessary to abandon the design of carrying meat. At the date of the policy it was known to both underwriters and assured that, although meat could be loaded at various ports in the above-named rivers, it could not be so loaded at Monte Video in consequence of the absence of appliances at that port:—*Held*, that the words "at Monte Video" in the clause defining the commencement of the assurance were a compendious mode of enumerating the several loading ports in the rivers named, that the clause was therefore not to be rejected as insensible, and that as no meat was ever loaded on board the ship the policy never attached. HYDARNES STEAMSHIP COMPANY *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY - - - - 590

INTEREST—Trustee—Bankruptcy—One trustee appointed of estates of two bankrupts—Conflicting interests - - 305
See BANKRUPTCY. 12.

INTERNATIONAL LAW—Ambassador—Immunities and privileges of - - 352
See LIMITATIONS, STATUTE OF.

JOINT CONTRACTOR—*Guarantee—Cheque given for Liability on—Unsatisfied Judgment on Cheque—Action against Joint Contractor on Guarantee—Res judicata.*] An unsatisfied judgment against one joint contractor on a cheque given by him alone for the joint debt, is not a bar to an action against the other joint contractor on the original contract.—The defendant and T. jointly guaranteed to the plaintiff the payment by a third person of his rent. A half-year's rent being in arrear, T. gave the plaintiff his cheque for the amount. The plaintiff sued T. on the cheque and recovered judgment, but such judgment was not satisfied. The plaintiff then sued the defendant on the guarantee:—*Held*, that the causes of action upon the cheque and upon the guarantee were not the same, that consequently the principle of *Kendall* v. *Hamilton* (4 App. Cas. 504) did not apply, and that the judgment against T. afforded no defence to the action.—*Drake* v. *Mitchell* (3 East, 251) followed.—*Cambefort* v. *Chapman* (19 Q. B. D. 229) disapproved. WEGG PROSSER *v.* EVANS - - - - 101

—— Joinder of co-contractors as defendants—Inability to serve one of several defendants—Staying action till service - 685
See PRACTICE. 7.

JUDGMENT—Joint contractor—Guarantee—Cheque given for liability on—Unsatisfied judgment on cheque—Action against joint contractor on guarantee—Res judicata - - - - 101
See JOINT CONTRACTOR.

JUSTICES—Case stated by justices—Transmission of case to Court—Lodging case in Crown Office - - - 349
See PRACTICE. 3.

—— Jurisdiction—Poor law—Pauper "entitled" to periodical payments—Application of guardians for order for payment - 323
See POOR LAW.

—— Metropolis—Nuisance—Summary jurisdiction—Summons, form of—Service 124
See METROPOLIS. 4.

—— Summons for water-rate—Limitation of time - - - - - 730
See WATERWORKS. 3.

LANDLORD AND TENANT—*Forfeiture—Breach of Covenant to Repair—Liability of Underlessee for Costs of Lessor's Solicitor and Surveyor—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 2—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 2, *sub-s.* 1; *s.* 4.] An underlessee is not, as between himself and the original lessor, a "lessee" within the meaning of the Conveyancing and Law of Property Act, 1892, *s.* 2, sub-*s.* 1, and

LANDLORD AND TENANT—*continued.*

therefore such lessor cannot recover from him the costs and expenses mentioned in that sub-section:—So *held*, reversing the decision of a Divisional Court.—By Lord Esher, M.R., and Davey, L.J.: A lessee who, by complying with a notice given under s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, prevents a right of forfeiture from becoming enforceable, is not "relieved" from a forfeiture within the meaning of s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892. NIND *v.* NINETEENTH CENTURY BUILDING SOCIETY - - C. A. 226

2. —— *Forfeiture—Re-entry—Bankruptcy of Lessee—Relief of Underlessee against Forfeiture—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 2, 6—*Conveyancing and Law of Property Act*, 1892 (55 & 56 *Vict. c.* 13), *s.* 4.] The provisions of s. 4 of the Conveyancing and Law of Property Act, 1892, enabling the Court to grant relief to an underlessee upon forfeiture of the superior lease by the lessee, extend to cases in which the Court would have no power to grant relief to the lessee himself.—The conditions on which relief ought in such a case to be granted to the underlessee considered. WARDENS, &c., OF CHOLMELEY SCHOOL, HIGHGATE *v.* SEWELL - - - 906

3. —— *Implied Grant—Lessor and Lessee—Damage by Vibration caused by Lessor on adjacent Land—Damages, Measure of.*] In an action by lessor against lessee for rent, the lessee counterclaimed for damages from a nuisance caused by the lessor. It appeared that the lessor during the lease had pumped water from land adjacent to the demised premises by means of powerful engines, and that the lessee's house was damaged by the vibration caused by the working of such engines, to such an extent that the premises became useless to him, and that he was obliged to remove his business to another house, and in consequence incurred expense. There was evidence that the house at the commencement of the term was old and unstable, and that a house of ordinary stability would not have been injured by the vibration:—*Held*, that the plaintiff was liable for damages under the counter-claim, for there was an implied obligation on his part not to derogate from his grant by using his adjoining property so as to interfere with the stability of the premises which he had let, and that he could not, therefore, rely upon any defence founded upon the state of such premises at the commencement of the term:—*Held*, also, that the damages recoverable by the defendant were not confined to the value of the term which he had lost, but included all loss which had happened to him as a natural consequence of the wrongful acts of the plaintiff, such as the expense of removing his business to other premises. GROSVENOR HOTEL COMPANY *v.* HAMILTON - - C. A. 836

—— Limitations, Statute of—Agreement for lease, possession under—Time from which period of limitation runs—Equitable right to lease - - - 648
See LIMITATIONS, STATUTE OF. 2.

LANDS CLAUSES ACTS—*Compensation—Determination of Amount of Compensation by Justices—Taking of part of Land subject to Lease—Interest less than a Year in Land taken, but greater than a Year in adjoining Lands—Injuriously affecting adjoining Lands—Jurisdiction of Justices to assess Compensation—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 68, 121.] By s. 121 of the Lands Clauses Consolidation Act, 1845, if lands comprised in a lease "shall be in the possession of any person having no greater interest therein than as a tenant for a year or from year to year, and if such person be required to give up possession of such lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same. . . ."—A railway company, with compulsory powers for the purchase of land, gave to a lessee notice to treat in respect of a part of the land held by him under a thirty years' lease made in 1889, and determinable as to the whole or any part of the premises by the lessor by three months' notice. Subsequently the lessor gave the lessee a three months' notice to determine the tenancy of that part of the land which was comprised in the notice to treat, and during the currency of the three months' notice the company took possession of such part of the land under s. 85 of the Lands Clauses Consolidation Act, 1845. The compensation payable to the lessee was subsequently assessed by a metropolitan police magistrate upon a summons under s. 121:—*Held*, that, assuming that the lessee was entitled to compensation for damage sustained by him during the residue of his term of thirty years in respect of the remainder of the land held by him, the magistrate had no jurisdiction, by virtue of s. 121, to assess such compensation, which could only be assessed by arbitration or a jury under s. 68 of the Act, and that he had only jurisdiction to assess compensation for the value of the lessee's interest in the land taken, and for damage sustained by him by severing or otherwise injuriously affecting the remainder of his land during the continuance of the term of three months for which the land taken was held.—*Reg.* v. *Kennedy* ([1893] 1 Q. B. 538) considered and explained. BEXLEY HEATH RAILWAY COMPANY *v.* NORTH - - - - C. A. 579

LIBEL—Privileged occasion—Absence of interest or duty in person to whom defamatory statement is made—Belief of defendant in existence of such interest or duty
See DEFAMATION. [54

LICENSING ACTS—*Licence—Renewal—Proceedings where no Notice of Opposition—Objection made in open Court—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.] An objection to the renewal of a licence made in open court at the general annual licensing meeting is a good "objection

LICENSING ACTS—*continued.*

made" within the meaning of the proviso to s. 42 of the Licensing Act, 1872, although neither the grounds nor the nature of the objection are stated by the objector, and upon such an objection being made the licensing justices have power to postpone the consideration of the application to an adjourned meeting. DAYKIN *v.* PARKER - - - - - 273

2. —— *Licence—Renewal—Proceedings where no Notice of Opposition—Objection made in open Court—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42—*Licensing Act*, 1874 (37 & 38 *Vict. c.* 49), *s.* 26.] An objection to the renewal of a licence, made in open court at the general annual licensing meeting, is a good "objection made" within the meaning of the proviso to s. 42 of the Licensing Act, 1872, although neither the grounds nor the nature of the objection are stated by the objector; and upon such an objection being made the licensing justices have power to postpone the consideration of the application to an adjourned meeting.—Judgment of the Queen's Bench Division ([1894] 2 Q. B. 273) affirmed. DAYKIN *v.* PARKER - - - C. A. 556

LIEN—Solicitor—Charging order—Assignment of judgment debt—Priority 180, 350
See SOLICITOR. 1, 2.

LIMITATION OF TIME—Summary proceedings—Height of buildings—Building erected on side of new street—Continuance at prohibited height after notice—Continuing offence - - - 826
See METROPOLIS. 2.

—— Summons for water rate - - 730
See WATERWORKS. 3.

LIMITATIONS, STATUTE OF—*Personal Action—International Law—Ambassador, Immunities and Privileges of—Debtor—Absence beyond Seas—Service of Writ out of the Jurisdiction*—21 *Jac.* 1, *c.* 16—4 *Anne, c.* 16, *s.* 19 (*Folio Edition*, 4 & 5 *Anne, c.* 3)—7 *Anne, c.* 12, *s.* 3—*Rules of the Supreme Court*, 1883, *Order XI.*] The immunity of an ambassador from process in the Courts of this country extends not merely to the time during which he is accredited to the Sovereign, but to such a reasonable period after he has presented his letters of recall as is necessary to enable him to wind up his official business and prepare for his return to his own country, and he is not deprived of the immunity by reason that his successor is duly accredited before that period has elapsed.—While the immunity of an ambassador from process exists, it is not competent for any person to sue out a writ against him (even though it be not served) or to renew such a writ if issued, and consequently the Statute of Limitations does not begin to run against his creditors during such period.—Order XI. of the Rules of the Supreme Court which enables plaintiffs, by leave, in certain cases to serve a writ, or notice of a writ, out of the jurisdiction where the defendant is neither a British subject nor in British dominions, has not the effect of annulling the right under 4 Anne, c. 16, to bring an action against a person after his return from beyond the seas within the time limited by 21 Jac. 1, c. 16. MUSURUS BEY *v.* GADBAN - C. A. 352

LIMITATIONS, STATUTE OF—*continued.*

2. —— *Agreement for Lease, possession under—Time from which Period of Limitation runs—Equitable Right to Lease—Right of Recovery at Common Law defeated by Equity—Implied Trust—Real Property Limitation Act*, 1833 (3 & 4 *Wm.* 4, *c.* 27), *ss.* 2, 7—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 9.] Under an agreement by the owners of land to grant leases of houses, when erected on such land by the intended lessees, the latter became entitled to a lease of two of such houses at a peppercorn rent for a term of years. No lease of these houses was ever granted, but the intended lessees and their successors in title continued in possession during the term of years under such circumstances that a Court of Equity, if applied to, would have decreed specific performance of the agreement for a lease:—*Held*, that during such term of years the Statute of Limitations did not begin to run against the owners of the land, inasmuch as they had not an effective right of entry or action for the recovery of the land.—By Kay, L.J., an intended lessee so let into possession is a cestui que trust within the meaning of the proviso to *s.* 7 of the Real Property Limitation Act, 1833, and, therefore, the operative part of the section does not apply to his case.—*Drummond* v. *Sant* (Law Rep. 6 Q. B. 763) approved of. WARREN *v.* MURRAY - - - - - C. A. 648

—— Copyhold—Seizure quousque by lord of manor - - - - 420
See COPYHOLD.

LIVERPOOL COURT OF PASSAGE—*Inferior Court—Appeal—Liverpool Court of Passage Act*, 1893 (56 & 57 *Vict. c.* 37), *s.* 10—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 45—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 1.] By the 10th section of the Liverpool Court of Passage Act, 1893, "An appeal shall be allowed upon the trial of any issue in the Court of Passage in every case where an appeal would be allowed on a trial at nisi prius, and subject to the same rules, regulations, and provisions":—*Held*, that under the above-mentioned section an appeal from the judgment in an action in the Court of Passage lies to the Court of Appeal. ANDERSON *v.* DEAN - - - - - C. A. 222

LOCAL GOVERNMENT—*County Council—Urban Authority electing to maintain Main Roads—Amount to be Paid by County Council—Arbitration by Local Government Board—Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *ss.* 11, 35.] Where an urban authority has claimed, under s. 11, sub-s. 2, of the Local Government Act, 1888, to retain the powers and duties of maintaining the main roads within its district, the amount to be paid to such urban authority by the county council in respect of such main roads can only be settled, in default of agreement, by the arbitration of the Local Government Board. IN RE BEDFORDSHIRE COUNTY COUNCIL AND BEDFORD URBAN SANITARY AUTHORITY - - 786

2. —— *Nuisance—Abatement—"Owner"—Premises not let at a Rack-rent—Sub-lease—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 141.] Where the lessee of premises not let at a rack-rent has sub-let them for the whole term,

LOCAL GOVERNMENT—*continued.*

less a few days, the rent reserved and the covenants and conditions being the same as in the original lease, the sub-lessee and not the lessee is the "owner" of the premises within the meaning of s. 141 of the Public Health (London) Act, 1891, which enacts that "owner" shall mean "the person for the time being receiving the rack-rent of the premises . . . . or who would so receive the same if such premises were let at a rack-rent." TRUMAN, HANBURY, BUXTON & Co. *v.* KEESLAKE - - - - - - 774

3. —— *Rates—Lighting Rate—Coal Mines—"Land"—"Houses, Buildings, and Property other than Land"—Poor Relief Act,* 1601 (43 *Eliz. c.* 2), *s.* 1—*Lighting and Watching Act,* 1833 (3 *&* 4 *Wm.* 4, *c.* 90), *s.* 33.] By the Lighting and Watching Act, 1833, s. 33, it is enacted that, for the purpose of levying the rate necessary for the purposes of the Act, "owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act":—*Held* (by Lopes, L.J., and Davey, L.J., the latter hesitating, affirming the decision of Mathew and Collins, JJ.), that coal mines are "property (other than land) rateable to the relief of the poor" within the meaning of the above-mentioned section, and therefore are rateable under that section at the higher rate. THURSBY *v.* CHURCHWARDENS, &c., OF BRIERCLIFFE-WITH-EXTWISTLE - - C. A. 11

4. —— *Sewers—Local Authority—Nuisance—Duty of Local Authority to provide for Sewage—Liability of Owner of Property Discharging Sewage into Sewer vested in Local Authority—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 13, 15, 94, 95, 96.] The respondent and other persons, without the knowledge of the sanitary authority of the district, connected their water-closets with a drain belonging to such authority, being the only drain available for that purpose. A nuisance having been caused thereby, the sanitary authority took proceedings under ss. 94, 95, and 96 of the Public Health Act, 1875, against the respondent alone, to obtain an order for the abatement of the nuisance. It was not proved that the sewage from the respondent's premises alone caused the nuisance. Twenty years had elapsed since the respondent's water-closets were connected with the drain. The sanitary authority had not carried out any system of drainage to provide for the disposal of the sewage within their district:—*Held*, that, as s. 15 of the Public Health Act, 1875, imposed upon the sanitary authority the obligation to provide such sewers as might be necessary for effectually draining their district for the purposes of the Act, they could not evade that obligation by taking these proceedings against the respondent, and therefore that the justices to whom the complaint of such authority was made were right in dismissing it. FORDOM *v.* PARSONS - - - - - 780

5. —— *Streets—Expenses of Sewering, Paving, &c.—Summary Proceedings against Frontager—Right to dispute Liability—Apportionment of Expenses, when conclusive—Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 257.] Sect. 150 of the Public Health Act, 1875, enables an urban sanitary authority, where any street (not being a highway repairable by the inhabitants at large) is not sewered, levelled, paved, &c., to their satisfaction, to give the owners of premises fronting on such street notice requiring them to execute the necessary works within a specified time; and, if such notice is not complied with, the urban authority may themselves execute the work, and recover in a summary manner the expenses incurred by them from the owners in default according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or, in case of dispute, by arbitration. Sect. 257 provides that the apportionment shall be binding and conclusive on the owner unless by written notice he disputes the same within three months.—The owner of premises fronting on a street having failed to comply with a notice, under s. 150, to sewer, &c., the street according to his frontage, the urban authority did the work themselves, and took proceedings before justices to recover the sum apportioned on him by their surveyor. The owner had given no notice, under s. 257, disputing the apportionment within the specified time. At the hearing of the complaint it was shewn that the carriage-way of the street was a highway repairable by the inhabitants at large, but that the footway on which the owner's premises fronted was not:—*Held*, on the authority of *Wake* v. *Mayor, &c., of Sheffield* (11 Q. B. D. 291; 12 Q. B. D. 142), that the urban authority had jurisdiction to give the notice and make the apportionment in respect of the footway, and that the owner having failed to dispute the apportionment under s. 257, it was conclusive against him, and he could not at the hearing before the justices dispute his liability to pay any part of the apportioned sum.—*Cook* v. *Ipswich Local Board* (Law Rep. 6 Q. B. 451) distinguished. MAYOR, &c., OF BOROUGH OF DERBY *v.* GRUDGINGS - 496

6. —— *"Street"—"Public Place"—Construction of Urinals below Surface of Ground—Tunbridge Wells Improvement Act,* 1890 (53 *&* 54 *Vict. c. cexxxv.*), *s.* 93—*Public Health Act,* 1875 (38 *&* 39 *Vict. c.* 55). *ss.* 39, 149.] Before the passing of the Tunbridge Wells Improvement Act, 1890, an agreement was entered into between the lord of the manor of Tunbridge Wells and the freehold tenants, by which it was provided that certain promenades on the waste of the manor should remain open and free for the public use of persons frequenting Tunbridge Wells "in the manner the same now are or have lately been used." This agreement was confirmed by special Act of Parliament. It did not appear that such promenades were highways repairable by the public at large.—By the Tunbridge Wells Improvement Act, 1890 (53 & 54 Vict. c. cexxxv.), s. 4, the word "street" is to have the same meaning as is assigned to it by the Public Health Acts. By s. 93, the corporation of Tunbridge Wells "may erect in any street or public place or on land belonging to them water-closets, urinals, and lavatories for the use of the public."—The corporation, assuming to act under the powers of

LOCAL GOVERNMENT—*continued.*

s. 93, made in one of the promenades a convenience for urinals, &c., sunk to a depth of nine feet, and lighted by skylights level with the surface of the promenade:—*Held*, that though the promenade was a "public place," still, as nothing had been dedicated to the public except the surface, the soil under the surface could not be considered part of a "public place" or "street" within the meaning of the Tunbridge Wells Improvement Act, 1890, and that the corporation were not entitled to erect the conveniences in question within such soil:—*Held* also, that the corporation could not justify their acts under ss. 39 and 149 of the Public Health Act, 1875, for assuming that the locus in quo was a street it was not a highway repairable by the inhabitants at large, and the property in the soil did not therefore vest in the corporation, but remained in the lord of the manor. BAIRD *v.* MAYOR, &c., OF TUNBRIDGE WELLS - C. A. 867

—— Pollution of river—"Wilfully permitting sewage matter to flow into stream"—Liability of local authority - 842
See RIVER.

—— Tramway—Purchase of undertaking by county council—Terms of purchase—Valuation of tramway - - 189
See TRAMWAY.

—— Waterworks—Fixing and maintaining fire-plugs—Liability of local board - 735
See WATERWORKS.

LONDON—City of London Court—Practice—Shorthand note. - - - 437
See COUNTY COURT.

MAINTENANCE OF SUIT—*Action for Libel—Reflection on Character of Person other than Plaintiff—Right of such Person to maintain Plaintiff in his Action—Common Interest.*] In an action for libel, brought against the proprietors of a newspaper in respect of the publication by them of an article reflecting upon the plaintiff's character, H., upon whose character the article also reflected, maintained the action by advising the plaintiff to commence it, and by employing his own solicitor to conduct it at H.'s sole expense. The action resulted in a verdict for the defendants therein, and thereupon they sued H. for maintenance, claiming as damages the costs they had incurred in defending the action for libel:—*Held*, that H. was liable in the action for maintenance, because he had no common interest with the plaintiff in the action for libel, and was not, therefore, entitled to maintain the plaintiff in bringing and prosecuting that action. ALABASTER *v.* HARNESS - - - - - - 897

MANDAMUS—Mine—Railway—Support—Compensation for minerals left unworked—Arbitration - - - - 512
See RAILWAY. 3.

MANOR—Copyhold—Implied admittance—Seizure quousque—Statute of Limitations - - - - - 420
See COPYHOLD.

MARRIED WOMAN—Compounding for rates—Procedure for recovery of rates—Imprisonment in default of distress - 924
See METROPOLIS. 5.

—— Judgment against—Execution limited to separate estate—Restraint on anticipation—Arrears of income becoming due after judgment - - - 559
See HUSBAND AND WIFE. 2.

—— Husband and wife—Contract made before marriage—Personal liability - 577
See HUSBAND AND WIFE.

MASTER AND SERVANT—Contract of Infant—Contract for benefit of infant—Insurance against accident—Exoneration of employer from liability - - 482
See INFANT. 2.

MEDICINE—Revenue—Stamp—"Held out or recommended to the public" - 363
See REVENUE. 4.

—— Sale of—Pharmacy Acts—Proprietary medicine - - - - - 720
See PHARMACY ACTS.

METROPOLIS—*Building Acts—Dangerous Structures—Not adjoining Public Street—Jurisdiction of Magistrate—Order for Demolition—Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *pt.* 2.] A justice of the peace has jurisdiction under s. 73 of the Metropolitan Building Act, 1855, to order the owner of a dangerous structure to take down, repair, or otherwise secure it, even though such structure is not adjacent to a highway, and consequently is not dangerous to the public. LONDON COUNTY COUNCIL *v.* HERRING - - 522

2. —— *Management Acts—Buildings, Height of—Building erected on Side of New Street—Continuance at prohibited Height after Notice—Continuing Offence—Complaint made within six Months after Commission or Discovery of Offence—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 85, 107.] Sect. 85 of the Metropolis Management Amendment Act, 1862, prohibits the erection of a building on the side of a new street of a less width than fifty feet, which shall exceed in height the distance from the front of the building to the opposite side of the street, without the consent of the London County Council, and imposes penalties for offences against the Act, and, in case of a continuing offence, a further penalty for every day during which such offence shall continue after notice from the County Council.—By s. 107, no person is liable to a penalty unless the complaint has been made within six months next after the commission or discovery of such offence.—The respondent was owner of a building of a height prohibited by s. 85. No proceedings were taken against him in respect of the erection of the building. More than six months after the completion of the building the London County Council served a notice, requiring him to comply with the law with respect to the building, subject to the penalties provided by s. 85, and afterwards summoned him for penalties of 40s. for each day after the date of the notice:—*Held*, that the continuance at a prohibited height, after notice, of a building already erected was a continuing offence within the meaning of the Act, that complaint had been

METROPOLIS—*continued.*

made within six months next after the commission or discovery of the offence, and that the respondent was liable. LONDON COUNTY COUNCIL *v.* WORLEY - - - - - - 826

3. —— *Buildings—Metropolis Management and Building Acts Amendment Act*, 1882 (45 & 46 *Vict. c.* 14), *s.* 13—"*Wooden Structure or Erection of a moveable or temporary character*"—*Bungalow erected for Sale and Removal.*] A bungalow constructed of wood and corrugated iron was erected on a piece of land for the purpose of exhibition and sale; but it was not used or occupied, or intended to be used or occupied, on the spot on which it was erected:—*Held*, that it was not a "wooden structure or erection of a moveable or temporary character" within the meaning of s. 13 of the Metropolis Management and Building Acts Amendment Act, 1882, and did not require a licence in writing from the London County Council for its erection. LONDON COUNTY COUNCIL *v.* HUMPHREYS, LIMITED 755

4. —— "*Owner*"—*Nuisance—Public Health Act—Summary Jurisdiction—Procedure where Owner of Premises is not known or cannot be found—Summons, Form of—Service—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 128.] Where a complaint to a petty sessional court is made by a sanitary authority under the Public Health (London) Act, 1891, alleging that a nuisance exists on premises caused by the act, default, or sufferance of the owner, a summons to answer the matter of such complaint is good in form, though it be addressed to the "owner" of the premises (describing them) merely, without further name or description.—Such a summons is a "document" within the meaning of the words "notice, order, or other document" in s. 128 of the Public Health (London) Act, 1891, and may therefore be properly served by delivering it to some person on the premises. THE QUEEN *v.* MEAD - - - - - - - 124

5. —— *Rates, Procedure for Recovery of—Imprisonment in Default of Distress—Married Woman—Owner—Compounding for Rates*—12 & 13 *Vict. c.* 14, *s.* 2—*Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 161—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4—*Summary Jurisdiction Acts*, 1879 (42 & 43 *Vict. c.* 49), *ss.* 6, 35; 1884 (47 & 48 *Vict. c.* 43), *ss.* 7, 10—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 13, *sub-s.* 11.] The Summary Jurisdiction Acts, 1879 and 1884, and the Interpretation Act, 1889, have not had the effect of superseding the remedy—namely, by distress and imprisonment in default of a sufficient distress—for the recovery of local rates recoverable, under s. 161 of the Metropolis Local Management Act, 1855, in the same manner as poor-rates.—A married woman, being owner of houses in a metropolitan parish as her separate property, gave notice to the overseers, under s. 4 of the Poor Rate Assessment and Collection Act, 1869, that she was willing to be rated in respect of such houses, whether the same were occupied or not, and that she claimed to be allowed the deductions from the amount of the rate, amounting to 30 per cent., specified in that section. Having been rated and allowed such deductions accordingly, she made default in paying the amount of the sewers, lighting, and general rates for the parish, which, by the Metropolis Local Management Act, 1855, are recoverable in the same manner as poor-rates:—*Held*, that she had made no contract with the overseers in respect of the rates so as to bring the case within s. 1 of the Married Women's Property Act, 1882, and the decision in *Scott* v. *Morley* (20 Q. B. D. 120), and therefore that she was liable to the ordinary remedy for the recovery of poor-rates—namely, by distress and imprisonment in default of a sufficient distress. IN RE ALLEN - - - - - - - 924

6. —— *Repairs of Carriage Road*—"*Necessary Works of Repair*"—*Apportionment and Recovery of Expenses—Necessity of Works—Jurisdiction—Magistrate—Local Authority—Metropolis Management Amendment Act*, 1890 (53 & 54 *Vict. c.* 66), *s.* 3.] Under s. 3 of the Metropolis Management Amendment Act, 1890, which empowers vestries or district boards to execute any "necessary works of repair" upon carriage roads, and to apportion and recover the expenses, it is for the vestry or district board to decide as to the necessity of the works, and they are not bound to prove such necessity to the satisfaction of the tribunal before which they seek to recover the expenses.—*Reg.* v. *Marsham* ([1892] 1 Q. B. 371) explained.—Decision of Divisional Court (Charles and Wright, JJ.) affirmed. STROUD *v.* WANDSWORTH DISTRICT BOARD OF WORKS - - - - C. A. 1

7. —— *Streets, Obstruction of—Costermongers—Statute—Construction—Repeal by Implication*—57 *Geo.* 3, *c. xxix. s.* 65—*The Metropolitan Streets Act*, 1867 (30 & 31 *Vict. c.* 134), *s.* 6—*The Metropolitan Streets Act Amendment Act*, 1867 (31 & 32 *Vict. c.* 5), *s.* 1.] Sect. 65 of 57 Geo. 3, c. xxix. (Michael Angelo Taylor's Act), which empowered vestries in the metropolis to take certain summary proceedings against persons placing stalls and goods upon the carriage ways or footways in streets or public places, is not repealed with respect to costermongers by the Metropolitan Streets Act, 1867, s. 6, and the Metropolitan Streets Act Amendment Act, 1867, s. 1, but is still in force.—So *held* by the Court of Appeal (Lindley, Kay, and A. L. Smith, L.JJ.).—*Held*, by Lindley and A. L. Smith, L.JJ., Kay, L.J., dissenting, that the Metropolitan Streets Act Amendment Act, 1867, s. 1, must be taken to authorize costermongers to carry on their business in the usual way, provided only that they comply with the police regulations, and that if they do so comply they cannot be proceeded against, either under 57 Geo. 3, c. xxix., s. 65, or under 30 & 31 Vict. c. 134, s. 6; but if they violate such regulations they may be proceeded against under either of those statutes.—*Summers* v. *Holborn District Board of Works* ([1893] 1 Q. B. 612) considered. KEEP *v.* VESTRY OF ST. MARY'S, NEWINGTON. AUSTIN *v.* VESTRY OF ST. MARY'S, NEWINGTON - - - C. A. 524

8. —— *Streets—Widening Streets—Compulsory Purchase—Power of Vestry to take part of House—Michael Angelo Taylor's Act* (57 *Geo.* 3.

METROPOLIS—*continued.*

c. xxix.), *ss.* 80, 82.] Where the authority having control of the streets in a metropolitan district bonâ fide adjudge that part of a house or building obstructs or prevents the widening of a street, ss. 80 and 82 of 57 Geo. 3, c. 29, give such authority power, under some circumstances, to purchase and take compulsorily such part from the owner, and he cannot require them to take the whole house or building, though he be able and willing to sell and convey the whole to them.—*Per curiam*: Sects. 80 and 82 gave the authority power to purchase and take compulsorily part only of a house or building, where the facts establish that such taking will not involve a substantial alteration of the character and condition thereof, so that it can no longer be occupied as the kind of building it was before, or that such taking will not sensibly and substantially interfere with the convenience of the occupier, or render it necessary to make structural alterations in order to carry on a different kind of business, or one of a more limited nature than that carried on before. GORDON *v.* VESTRY OF ST. MARY ABBOTTS, KENSINGTON 742

9. —— *Unsound Food—Public Health—Offence—Fruit unfit for the Food of Man—Liability to Seizure—"Found in the Possession of any Person"—Purchase for the Food of Man—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 47, *sub-s.* 3.] By the Public Health (London) Act, 1891, s. 47, sub-s. 1, any medical officer of health or sanitary inspector may enter premises and inspect and examine any article intended for the food of man, and sold or exposed for sale, or deposited for sale or preparation for sale; and, if such article appears to be unfit for the food of man, may seize it, and, by sub-s. 2, it may be condemned.—By sub-s. 3, where it is shewn that any article liable to be seized under the section, and found in the possession of any person, was purchased by him for the food of man, and when purchased was in such a condition as to be liable to be seized and condemned under the section, the seller is liable to a penalty unless he proves that, when he sold the article, he did not know, and had no reason to believe, that it was in such condition:—*Held*, by the Court (Mathew, J., dissenting), that the vendor can only be convicted under sub-s. 3 where the article is liable to be seized after it has got into the possession of the purchaser.—The defendant, a fruit broker, was charged under sub-s. 3. He had sold walnuts which turned out to be unsound. A printed notice was posted up in his shop, to the effect that the walnuts were sold on the condition that, if any of the contents of the bags should prove unsound, the buyer should sort them and destroy the unsound walnuts.—The jury were directed to find the defendant guilty, if he sold the walnuts when unfit for the food of man, unless he proved that he did not know, and had no reason to believe, that they were so, and were told that the defendant could not contract himself out of liability by agreeing that the buyer should sort out and destroy the bad nuts, and that they must disregard the printed notice.—*Held*, by Hawkins, Cave, Grantham, Charles, Vaughan Williams, Lawrance, Wright, Collins, Bruce, and Kennedy, JJ. (Mathew, J., dissenting), that the conviction was wrong, and must be quashed.—*Held*, by Hawkins, Grantham, Charles, Lawrance, Wright, Bruce, and Kennedy, JJ., that the jury ought to have been asked whether the sale was made subject to the terms of the printed notice, and whether the walnuts were purchased for the food of man.—*Held*, by Mathew and Cave, JJ., that, assuming the notice to be embodied in the contract of sale, the defendant was not thereby relieved of the duty intended to be imposed upon him as seller by sub-s. 3, and that the question, whether the unsound walnuts were purchased for the food of man, ought not to be put to the jury.—*Held*, by Mathew, J., that, when the defendant sold the walnuts, they were intended for the food of man, and were sold to be used for food while they were unsound and unwholesome, and, therefore, were "liable to be seized" under sub-s. 3, and that the conviction ought to be affirmed. THE QUEEN *v.* DENNIS - - C. C. R. 458

—— Tramway — Purchase of undertaking by county council—Terms of purchase—Valuation of tramway - - 189
See TRAMWAY.

MINE—Canal company—Right to support for canal—Mines under or near canal—Compensation for not working mine - 632
See CANAL COMPANY.

—— Coal—Purchase by railway company of all subjacent strata except coal—Right of owner of coal to compensation before the commencement of working coal mine - - - - - - 915
See RAILWAY. 2.

—— Railway—Support—Compensation for minerals left unworked—Arbitration—Mandamus - - - - - 512
See RAILWAY. 3.

MONEY HAD AND RECEIVED—Unauthorized borrowing by agent—Money applied for benefit of principal—Claim by lender [40
See PRINCIPAL AND AGENT.

NEGLIGENCE—Bill of exchange—Alteration—Stamp sufficient to cover amount of bill after alteration—Estoppel - 660
See BILL OF EXCHANGE.

—— Waterworks — Apparatus out of repair — Water company, liability of - 599
See WATERWORKS. 2.

NOTICE OF DISHONOUR—Bill of exchange—"On the last day of grace" - 759
See BILL OF EXCHANGE. 2.

NUISANCE—*By-law—Making Noise in Streets to Annoyance of Inhabitants—Proof.*] A by-law of a borough provided that if any person should make any noise in any of the streets of the borough to the annoyance of the inhabitants he should be guilty of an offence:—*Held*, that, upon a summons under the by-law, it was not necessary to prove that more than one inhabitant had been in fact annoyed. INNES *v.* NEWMAN - - 292

2. —— *Poisonous Trees—Injury to Cattle—Yew Tree near Boundary of Field—Whether Duty*

NUISANCE—*continued.*

on Occupier of Land to prevent access of Neighbour's Cattle to Poisonous Tree.] The plaintiff and the defendants occupied adjoining fields separated by a fence and ditch belonging to the defendants. The ditch was on the side of the fence next the plaintiff's field, his boundary being the edge of the ditch. On the defendants' side of the fence grew a yew tree, the branches of which extended over the fence and partly over the ditch, but no part of the tree extended over or up to the plaintiff's boundary. The defendants were under no liability to fence against their neighbour's cattle. The plaintiff's horse ate of the branches extending over the ditch, and died therefrom. In an action to recover as damages the value of the horse:—*Held*, that the defendants were not liable, because there was no duty on them to take means to prevent the plaintiff's horses from having access to the branches of the tree. PONTING *v.* NOAKES - - - 281

—— Abatement—"Owner"—Premises not let at a rack-rent—Sub-lease - - 774
See LOCAL GOVERNMENT. 2.

—— Landlord and tenant — Implied grant — Lessor and lessee—Damage by vibration caused by lessor on adjacent land—Damages, measure of - - 836
See LANDLORD AND TENANT. 3.

—— "Wilfully permitting" sewage matter to flow into stream — Liability of local authority - - - - 842
See RIVER.

ORIGINATING SUMMONS—Solicitor—Summons for delivery up of client's papers - 163
See PRACTICE. 6.

PARTIES — Joint contractors — Joinder of co-contractors as defendants—Inability to serve one of several defendants—Staying action till service - - - 685
See PRACTICE. 7.

PARTNERSHIP — Bankruptcy—Assets—Execution levied against firm—Bankruptcy of one partner - - - - 338
See BANKRUPTCY. 8.

PATENT MEDICINE—Pharmacy Acts—Sale of poisons - - - - 720
See PHARMACY ACTS.

PAUPER—Appeal from county court—Appeal in formâ pauperis—Proceedings on Crown side of Queen's Bench Division - 482
See INFANT. 2.

—— Suing in formâ pauperis—Notice of motion by plaintiff — Signature of solicitor — Plaintiff in default seeking indulgence—Power to impose terms as to payment of costs - - - - - 37
See PRACTICE. 8.

PENALTY—Merchant Shipping Acts—Offences —Liability of owner for act of master
See SHIP. [412

—— Proceedings for recovery of—Excise—Proof of authority to take proceedings 794
See REVENUE. 2.

PETITION—Bankruptcy—Statement of date of act of bankruptcy—Amendment 234
See BANKRUPTCY.

PHARMACY ACTS—*Sale of Poisons—Medicine containing a Scheduled Poison—Patent Medicine—Pharmacy Act*, 1868 (31 & 32 *Vict. c.* 121), *ss.* 1, 2, 15, 16, 17.] The prohibition in s. 15 of the Pharmacy Act, 1868, against the sale of poisons by other than registered chemists, is not confined to the sale of the scheduled poisons in their simple state, or of preparations of such poisons, but extends to the sale of a compound containing a scheduled poison as one of its ingredients.—The exception in s. 16 of the Act, as to the making or dealing in patent medicines, does not extend to proprietary medicines.—*Pharmaceutical Society* v. *Piper & Co.* ([1893] 1 Q. B. 686) approved. PHARMACEUTICAL SOCIETY *v.* ARMSON C. A. 720

POISON—Sale of—Proprietary medicine - 720
See PHARMACY ACTS.

POOR LAW—*Pauper "entitled" to Periodical Payments—Application of Guardians for Order for Payment—Justices—Jurisdiction (Petty Sessions)—Whether Justices have Jurisdiction where Pauper's right disputed—Divided Parishes and Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 23.] By s. 23 of the Divided Parishes and Poor Law Amendment Act, 1876: "Where any pauper shall be entitled to any annuity or periodical payment, the trustee or other person bound to make payment of the same to the pauper may from time to time pay to the board of guardians of any union or parish, out of the instalments which have become due, the cost incurred in the relief of such pauper accrued since the last instalment;" and where such trustee or other person declines to make such payment, the guardians may apply to the justices at petty sessions, who may, "if satisfied that it is right under all the circumstances to do so," make an order upon him to pay the requisite amounts then due to the guardians, provided that they or their relieving officer have declared the relief to be given on loan.—On an application by guardians for an order under the above section, the pauper's right to the periodical payment in question was disputed by the persons alleged to be bound to make it:—*Held*, that the justices had no power to hear and determine the matter of the application, because s. 23 made it a condition precedent to the exercise of their jurisdiction that the right of the pauper to receive the periodical payment should be undisputed. THE QUEEN *v.* RICHARDSON - - - - - 323

POOR-RATE—*Assessment of Cotton Mills—Stoppage of Works through a Strike—Possibility of estimating duration of Strike—Occupation of Mills during Stoppage.*] Two days before the making of an assessment for the relief of the poor on certain cotton mills of the appellants, in conformity with the valuation list then in force, a strike occurred which caused the stoppage of the mills. During the strike the mills were occupied by the appellants' servants for the purpose of keeping the machinery in order. The appellants objected to the valuation list. When the objections were heard by the assessment committee, who declined to amend the list, the strike, which

POOR-RATE—*continued.*

had lasted several months, had ended. On a case stated on an appeal to Quarter Sessions:—*Held* (affirming the decision of a Divisional Court), that the assessment was valid, as the assessment committee were not bound to take into consideration the particular strike, and it did not appear that they had disregarded the general contingency of strikes:—*Held*, also, that the assessment, having been properly made, could not be subsequently reduced by treating the mills as warehouses, for storing machinery only, during the stoppage of work.—*Staley* v. *Overseers of Castleton* (5 B. & S. 505) distinguished. HOYLE & JACKSON *v.* ASSESSMENT COMMITTEE FOR POOR LAW UNION OF OLDHAM, AND CHURCHWARDENS, &c., OF TOWNSHIP OF OLDHAM - C. A. 372

2. —— *Exclusive Occupation—Docks.*] The Mersey Docks and Harbour Board were empowered by their special Act, upon such terms and on payment of such rates or other sums of money and subject to such restrictions and regulations as they might think proper, to set apart and appropriate any particular portion of any dock, wharf, quay, warehouses or sheds for the exclusive accommodation and use of any company, firm, or individual engaged in carrying on any particular trade; but such company, firm, or individual were to be subject to the general rules and regulations of the board. And they had also power to construct depôts, sheds, cranes, and other machinery, and make charges for the same, and to let such sheds and any portions of the quays and berths at such rents and on such terms as they might deem expedient.—The board agreed to set apart and appropriate to the plaintiffs, who were a canal company, and the plaintiffs agreed to occupy, a berth 200 feet in length with the quay opposite thereto, the appropriation to be determinable at six months' notice, at a fixed yearly rent, which was to include the interest of the cost of two cranes erected on the premises; the plaintiffs were to pay all rates and taxes assessed on the premises, except such as were legally chargeable to the landlords; the plaintiffs were to keep the premises in repair, and conform to the rules and regulations of the board, and to allow the board at all times to have free access to the premises. The board reserved a right of re-entry on non-payment of rent or non-performance of the conditions of the agreement.—The plaintiffs having been rated to the poor-rate in respect of their alleged occupation of the premises:—*Held*, that, having regard to the intention of the parties, as expressed in the agreement, the board had not parted with the exclusive possession of the premises, and that the plaintiffs were not rateable in respect of their occupation.—*Allan* v. *Overseers of Liverpool* (Law Rep. 9 Q. B. 180) followed. ROCHDALE CANAL COMPANY *v.* BREWSTER [C. A. 352

3. —— *Harbour Dues—Dues unconnected with Occupation of Land by Commissioners—Rateability.*] The appellants, commissioners appointed for the improvement of a harbour, were empowered under special Acts to levy "harbour dues" for all vessels entering the harbour, and "goods dues" and "ballast dues" for all goods and ballast shipped or unshipped at any place within the harbour. The appellants were the occupiers of certain goods quays and ballast quays adjoining the harbour; but the soil of the harbour itself was not vested in them. The facilities afforded by the appellants' quays largely contributed to the amount of the dues received by them; but there were other places in the harbour not occupied by the appellants where vessels might be moored and where goods or ballast might be shipped or unshipped. On appeal against a rate by which the appellants were rated to the relief of the poor in respect of their occupation of the quays:—*Held*, that no part of the harbour dues, goods dues, or ballast dues received by the appellants was sufficiently connected with their occupation of the quays to be taken into account as enhancing their rateable value. BLYTH HARBOUR COMMISSIONERS *v.* CHURCHWARDENS, &c., OF NEWSHAM AND SOUTH BLYTH AND ASSESSMENT COMMITTEE OF TYNEMOUTH UNION - - 293

4. —— *Rateable Value—Enhancement—Occupation of Quays adjoining Harbour—Harbour Dues payable by Statute to Occupiers of Quays.*] Commissioners for the improvement of a harbour were rated to the relief of the poor in respect of their occupation of quays adjoining the harbour. They were not owners or in occupation of the soil of the harbour; but, by the special Act which incorporated them, were empowered to demand and receive "harbour dues" for every vessel entering the harbour or departing therefrom or remaining therein, and "goods dues" in respect of all goods shipped or unshipped within the harbour. The facilities for berthing vessels alongside the quays, and for shipping and unshipping goods therefrom and thereon, caused a greater number of vessels to enter the harbour than would otherwise have entered it, and in consequence largely increased the amount of the dues payable to the commissioners; but vessels could be berthed, and goods shipped and unshipped, in other places in the harbour not occupied by the commissioners, and the same dues were payable whether vessels entering the harbour used the commissioners' quays or not:—*Held*, affirming the decision of the Queen's Bench Division, that the dues received by the commissioners from vessels using their quays could not be taken into account as enhancing the rateable value of those quays. BLYTH HARBOUR COMMISSIONERS *v.* CHURCHWARDENS, &c., OF NEWSHAM AND SOUTH BLYTH AND ASSESSMENT COMMITTEE OF TYNEMOUTH UNION - - - C. A. 675

5. —— *Rateable Value — Docks — Docks in several Parishes—Dock Dues—Apportionment in Different Parishes—Dock Railways—Incapacity to charge Tolls—Annual Value—Hypothetical Tenant*—6 & 7 *Wm.* 4, *c.* 96, *s.* 1.] The undertaking of a dock company, authorized by various Acts of Parliament, consisted of a number of docks, some with access to one another, and some separate from the others, and quays, wharfs, warehouses, workshops, and other works, connected with the various docks. The docks were situated in four parishes in the respondent union, and in some cases a dock was situated partly in one parish and partly in another in the union, and in other cases partly in the parish in the

POOR-RATE—*continued.*

union and partly in a parish outside the union. One dock due was taken for the use of all or any of the docks, and dock rents were charged for vessels remaining in the docks beyond a certain time. The dock company prepared separate accounts of the receipts and expenditure in each parish, shewing the amount of dock dues and rents earned in each parish. The respondents ascertained the rateable value of the whole undertaking, and from this they deducted the rateable value of all property other than the docks. The balance, representing the rateable value of the docks only, was divided among the parishes in the proportion that the water area in each parish bore to the entire water area of the docks. On appeal against an assessment made upon this footing:—*Held* (by Lord Halsbury, and Lopes and Kay, L.JJ.), that as it was shewn to be practicable to ascertain the earnings in respect of dock dues and rent in each parish, the assessment ought to be made upon the basis of the earnings in each parish, and that the assessment was bad.—*Reg.* v. *Hull Dock Co.* (18 Q. B. 325) distinguished and explained.—A dock company were authorized by statute to make junctions between the dock railways and the line of an adjoining railway company, but no tolls were to be taken by the dock company for the use of the dock railways, or of their tramways in connection therewith:—*Held* (by Lopes and Kay, L.JJ., Lord Halsbury dissenting), that the incapacity to take tolls did not exempt the dock company from liability to be assessed in respect of the railways and tramways at the amount at which they might, but for the restriction on taking tolls, be let to an hypothetical tenant. HULL DOCKS COMPANY *v.* GUARDIANS OF POOR OF SCULCOATES UNION - - - - - - C. A. 69

6. —— *Exemption—Society instituted for purposes of the Fine Arts exclusively—"Voluntary Contributions"*—6 & 7 *Vict. c.* 36, *s.* 1.] A society called the Art Union of London was incorporated by charter in 1846 for the advancement of the fine arts. The society's funds were derived from annual subscriptions. Membership was confined to subscribers, and might at any time be determined by failure to continue the annual subscription. Each subscriber of a guinea for the year received an engraving of a picture, and had a chance of winning a prize of a certain amount in an annual lottery. The amount of the prizes so won was expended in the purchase of works of art selected by the winners respectively, which the society purchased from the artist and paid for; and such works of art were exhibited before being given to the winners at an annual exhibition of the society, to which all the members had access. No dividend, gift, division, or bonus, in money, was made unto or between any of the members of the society:—*Held* (by Lord Esher, M.R., and Kay, L.J., A. L. Smith, L.J., dissenting, reversing the judgment of a Divisional Court), that the society was entitled to exemption from rateability under 6 & 7 Vict. c. 36, s. 1, as being a society instituted for purposes of the fine arts exclusively, and supported by annual voluntary contributions, the word "voluntary" as used in the Act meaning "not compulsory."—By

POOR-RATE—*continued.*

A. L. Smith, L.J.: Although the society was instituted for purposes of the fine arts exclusively, it was not supported by voluntary contributions. The term "voluntary," as used in the Act, does not signify merely "not compulsory"; and payments made with the object of procuring material advantages for the makers of them are not "voluntary contributions" within the meaning of the Act. ART UNION OF LONDON *v.* OVERSEERS OF THE SAVOY - - - - C. A. 609

—— Compounding for rates—Married woman—Imprisonment in default of distress 924
See METROPOLIS.

PRACTICE—*Amendment—Writ for Service out of Jurisdiction—Statement of Claim indorsed on Writ—Power to amend Statement of Claim—Order XI.; Order XXVIII., rr.* 1, 6.] The provisions of Order XXVIII. as to the amendment of indorsements and pleadings apply to writs issued for service out of the jurisdiction, and a statement of claim indorsed on such a writ may be amended without the necessity of re-serving the writ or notice thereof upon the defendant after amendment.—Where leave for such amendment is necessary, the plaintiff must shew that the amended claim is in respect of a cause of action which would have entitled him, had it been preferred in the first instance, to leave to issue a writ for service out of the jurisdiction. HOLLAND *v.* LESLIE - - - - - - 346

2. —— *Amendment—Writ for Service out of Jurisdiction—Statement of Claim indorsed on Writ—Power to amend Statement of Claim—Order XI.; Order XXVIII., rr.* 1, 6.] The provisions of Order XXVIII. as to the amendment of indorsements and pleadings apply to writs issued for service out of the jurisdiction.—Where a writ had been issued for service, and served out of the jurisdiction, and the defendant had appeared thereto:—*Held*, affirming the decision of a Divisional Court, that the indorsement of claim on such writ might be amended under Order XXVIII., the amendment sought to be made not introducing a cause of action in respect of which leave for service out of the jurisdiction could not have been given. HOLLAND *v.* LESLIE - - C. A. 450

3. —— *Case stated by Justices—Transmission of Case to Court—Lodging Case in Crown Office*—20 & 21 *Vict. c.* 43, *s.* 2.] By 20 & 21 Vict. c. 43, s. 2, upon an appeal by way of a case stated against a decision of justices, the appellant must, within three days after receiving the case, "transmit" it to the Court:—*Held*, that in order to satisfy the requirements of the section, the case must be lodged by the appellant at the Crown Office within the three days. ASPINALL *v.* SUTTON - - - - - 349

4. —— *Evidence taken in other Causes—Admissibility of such Evidence in subsequent Action—Order XXXVII., r.* 3.] Order XXXVII., r. 3, as to the reading in any cause, either by leave or on notice, evidence taken in other causes or matters, has only the effect of doing away with the necessity for an order to read such evidence, and does not affect the admissibility of the evidence in the cause in which it is sought to read it. PRINTING

PRACTICE—*continued.*

TELEGRAPH AND CONSTRUCTION COMPANY OF AGENCE HAVAS *v.* DRUCKER - - C. A. 801

5. —— *Evidence—Witness called by Judge—Cross-examination.*] At the trial of an action the judge has power to call and examine a witness who has not been called by either of the parties, and, when he does so, neither party has a right to cross-examine the witness without the leave of the judge.—If the evidence of the witness given in answer to questions put to him by the judge is adverse to either of the parties, leave should be given to that party to cross-examine the witness upon his answers, but a general cross-examination ought not to be permitted. COULSON *v.* DISBOROUGH - - - - C. A. 316

6. —— "*Originating Summons*"—*Solicitor—Summons for delivery up of Client's Papers—Order* LV., *r.* 4; *Order* LV., *r.* 3; *Order* LXXI., *r.* 1—*Order as to Supreme Court Fees*, 1884—*Rules of Supreme Court, November*, 1893, *Order* LIV., *rr.* 4 *B*, 4 *C*, 4 *D*, 4 *E*; *Order* LIV. *A.*] By Order LXXI., r. 1, an "originating summons" means "a summons by which proceedings are commenced without writ":—*Held*, that this definition means a summons by which proceedings, which under the whole practice would have been commenced by bill in Chancery or by writ, are commenced without a writ.—Consequently, a summons calling upon a solicitor to deliver up his client's papers is not an "originating summons," and it is sufficient if it is served two clear days before the day appointed for hearing, and it is not necessary that an appearance should be entered to it. IN RE W. HOLLOWAY (A SOLICITOR). EX PARTE PALLISTER - - - C. A. 163

7. —— *Parties—Joinder of co-Contractors as Defendants—Inability to serve one of several Defendants—Staying Action till Service—Order* XVI., *r.* 11.] Where an action is brought against several joint contractors, all of whom are within the jurisdiction, the action will not be stayed on the ground that one of the defendants has not been served, if it appears that the plaintiff has done everything in his power to effect service. ROBINSON *v.* GEISEL - - - C. A. 685

8. —— *Pauper—Suing in formâ pauperis—Notice of Motion by Plaintiff—Signature of Solicitor—Plaintiff in Default seeking Indulgence—Power to impose Terms as to Payment of Costs—Order* XVI., *r.* 29.] A person admitted to sue in formâ pauperis to whom no solicitor has been assigned is entitled to move the Court without the notice of motion being signed by a solicitor.—Where a person admitted to sue in formâ pauperis is in default, and asks for indulgence, he may be required, as a condition of such indulgence being granted, to pay the costs incurred by the other party by reason of such default. JACOBS *v.* CRUSHA - - - C. A. 37

9. —— *Security for Costs—Plaintiff resident out of the Jurisdiction—Action on Foreign Judgment.*] Where a person resident out of the jurisdiction brings an action in this country, the fact that the action is brought on a foreign judgment, recovered in proceedings in which the defendant appeared, does not affect the right of the defendant to security for costs. CROZAT *v.* BROGDEN [C. A. 30

PRACTICE—*continued.*

—— Appeal from county court—Appeal in formâ pauperis—Proceedings on Crown Side of Queen's Bench Division - 482
See INFANT. 2.

—— Bankruptcy—Appeal from county court—Appeal from incidental order of judge of High Court - - - 554
See BANKRUPTCY. 10.

—— Bankruptcy—Petition—Amendment 234
See BANKRUPTCY.

—— Company—Voluntary winding-up—Stay of proceedings in action—Costs - 380
See COMPANY.

—— Costs—Action in High Court—County court—Jurisdiction—Balance not exceeding 50*l.*—Admitted set-off - - 861
See COUNTY COURT. 3.

—— Costs—County court—Action commenced in High Court—Payment of part of claim after action brought—Transfer of action as to residue to county court—Recovery of residue in county court - 329
See COUNTY COURT. 2.

—— Costs—Taxation—Costs of reference—Cause referred for trial—Special referee 159
See ARBITRATION. 2.

—— County court — Jurisdiction — Remitted action—Action for unliquidated damages [332
See COUNTY COURT. 5.

—— Habeas corpus—Costs—Jurisdiction to order payment - - - - 382
See HABEAS CORPUS.

—— Mandamus—Action - - - 512
See RAILWAY. 3.

—— Married woman—Judgment against—Execution limited to separate estate—Restraint on anticipation - - 559
See HUSBAND AND WIFE. 2.

—— Remitted action—Counter-claim for unliquidated damages—Power to order trial in county court - - - 832
See COUNTY COURT. 6.

—— Solicitor—Clerk—County court—Right of audience - - - - 440
See COUNTY COURT. 7.

PREVIOUS CONVICTION — Criminal law — Practice - - - - 170
See CRIMINAL LAW. 5.

PRINCIPAL AND AGENT—*Liability of Principal—Unauthorized Borrowing by Agent—Money applied for Benefit of Principal—Claim by Lender for Money received—Cheque signed by Procuration—Limited Authority to sign—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 25.] The defendants' manager, who had authority to draw on the defendants' banking account for the purposes of their business, but had no authority to overdraw the account, or to borrow money on behalf of the defendants, borrowed 20*l.* from the plaintiff, stating that he wanted the money to pay the wages of the defendants' workmen, and gave as security a cheque signed in his own name by procuration for the defendants. The manager had overdrawn the defendants' banking account, and he borrowed the money for his own

PRINCIPAL AND AGENT—*continued.*

purposes, to replace money of the defendants which he had abstracted, but he paid the money in to the defendants' account at their bank, and used it to pay the wages of the defendants' workmen.—In an action on the cheque, and to recover the amount as money received to the use of the plaintiff:—*Held*, first, that as, by virtue of s. 25 of the Bills of Exchange Act, 1882, the plaintiff must be taken to have had notice that the agent had but a limited authority to sign, and the defendants could only be bound if the agent acted within the limits of his authority, the claim on the cheque must fail:—*Held*, secondly, that, as the money had found its way into the defendants' possession, and had been employed for their benefit, it was money received by them to the use of the plaintiff, and, although the defendants had not been aware that their manager had borrowed the money, the plaintiff was entitled to recover.—*Marsh* v. *Keating* (1 Bing. N. C. 198) followed. REID *v.* RIGBY & Co. 40

PRIVILEGE—Libel—Absence of interest or duty in person to whom defamatory statement is made—Belief of defendant in existence of such interest or duty 54
See DEFAMATION.

PROOF—Bankruptcy—Secured creditor—Guarantee - - - - 256
See BANKRUPTCY. 11.

PUBLIC HEALTH—Metropolis—Unsound food—Fruit unfit for the food of man—Liability to seizure—"Found in the possession of any person" - - 458
See METROPOLIS. 9.

RAILWAY — *Bye-laws — Validity — Penalty — Using Ticket not available—Absence of Fraud—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 103, 104, 108, 109—*Regulation of Railways Act*, 1889 (52 & 53 *Vict. c.* 57), *s.* 5, *sub-s.* 3 (*a*)—*Statute Law Revision Act*, 1892 (55 & 56 *Vict. c.* 19).] The appellant was convicted of travelling on the respondents' railway with a ticket not available for the day on which he used it, under a bye law which subjected to a penalty "Any passenger using or attempting to use a ticket on any day for which such ticket is not available." He was not guilty of fraud, and had no intention to commit fraud:—*Held*, that, in the absence of fraud, the appellant was not liable to be convicted, that the bye-law was invalid, and the conviction must be set aside. HUFFAM *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY - - - - - - 821

2. —— *Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 77-80—*Minerals—Purchase by Railway Company of all Subjacent Strata except Coal—Right of Owner of Coal to Compensation before the commencement of working Coal Mine.*] A railway company having given to a landowner, beneath whose land were valuable beds of coal, a notice to treat for certain land, "together with the stone, sand, clay and gravel within and under the same," and a second notice to treat for certain other land, "together with the mines and minerals thereunder, except all mines, beds and seams of coal"; the amount

RAILWAY—*continued.*

of the purchase-money and compensation payable to the landowner under the notices to treat was referred to arbitration. At the date of the arbitration the subjacent and adjacent coal was not being worked, nor was there any immediate prospect of its being worked in the ordinary course of mining. At the hearing of the arbitration evidence was admitted by the arbitrator of the value of the subjacent and adjacent coal which it would be necessary to leave for the support of the railway:—*Held*, that the evidence was wrongly admitted; that the rights of the landowner and the railway company were not altered by the fact that the latter had taken some of the underground strata as well as the surface of the land; and that the landowner was not entitled to recover compensation in respect of ungotten coal until the time arrived for working the coal-beds, and then only by virtue of proceedings under s. 77 and the following sections of the Railways Clauses Consolidation Act, 1845. IN RE AN ARBITRATION BETWEEN LORD GERARD AND LONDON AND NORTH WESTERN RAILWAY COMPANY - - - - - 915

3. —— *Support—Compensation for Minerals left unworked—Arbitration—Mandamus—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 35—*Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *ss.* 6, 78, 81.] The provisions of the Lands Clauses Act, relating to the assessment of compensation, apply to the assessment of compensation under s. 78 of the Railways Clauses Act.—The owners of certain mines, which lay under a railway, having given notice of their intention to work them, the railway company required a certain amount of support to be left. Arbitrators were appointed to settle the amount of compensation to be paid by the railway company in respect of the minerals required to be left unworked, and in respect of the continuous working of the mines being interrupted, and in respect of their being worked under restrictions, so as not to affect the railway:—*Held*, that the claim of the mine-owners was made under s. 78 of the Railways Clauses Act, and therefore that the provisions of the Lands Clauses Act as to the assessment of compensation applied.—The Court will not refuse to grant a prerogative writ of mandamus in every case in which an action of mandamus would lie.—*Reg.* v. *Lambourn Valley Ry. Co.* (22 Q. B. D. 463) explained. THE QUEEN *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - 512

—— Passenger—Condition—Passenger travelling at his own risk—Infant - 65
See INFANT.

RAILWAY AND CANAL COMMISSION—"*Reasonable facilities for the receiving and forwarding and delivering of Traffic*"—*Closing of Station for Passenger Traffic, at which there is a substantial amount of such Traffic, without providing an equivalent—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2.] A railway company who close a station for passenger traffic, at which there is a substantial amount of such traffic, without providing an equivalent, commit a breach of their obligation to "afford all reasonable facilities for the receiving and forwarding

RAILWAY AND CANAL COMMISSION—*contd.*
and delivering of traffic" pursuant to s. 2 of the Railway and Canal Traffic Act, 1854. DARLASTON LOCAL BOARD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - **R. C. C. 45**

2. —— "*Reasonable facilities for the receiving and forwarding and delivering of Traffic*"—*Closing Station for Passenger Traffic—Order of Railway Commissioners involving Re-opening Station—Jurisdiction—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 1, 2.] By the Railway and Canal Traffic Act, 1854, s. 1: "The word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic"; and by s. 2: "Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively. . . ."—A railway company closed, for passenger traffic, a station, on a branch line which they had been authorized by statute to make, as they were incurring a loss by keeping it open. The station was subsequently pulled down. Passenger service was discontinued over the branch line, as without the station it would have been of no advantage to the public. On an application by a local board to the Railway Commissioners, the commissioners made an order reciting that the applicants had complained that the company had ceased to use the branch railway for the conveyance of passengers, and had closed the station on such railway previously used for such traffic, and that such complaint had been proved to be true, and requiring the company to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic upon and from the said railway. The reasonable facilities ordered could not be afforded unless the station were rebuilt. On appeal:—*Held*, that the commissioners had no jurisdiction to make the order.—By Lord Esher, M.R., and A. L. Smith, L.J., on the ground that the Railway and Canal Traffic Act, 1854, does not compel a railway company to maintain and use its railway or stations, and the company was within its rights in closing the station.—By Kay, L.J., on the ground that, if an order could be made in any case to keep a station open, such an order, when it would compel a railway company to carry on their business at a loss, was not an order on them to give "reasonable facilities" within the meaning of the statute. DARLASTON LOCAL BOARD *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY [**C. A. 694**

RATE—*Assessment to Church Rate*—"*Full Annual Rent or Value*"—*Rateable Value*—1 & 2 *Geo.* 4, *c. cxiv. s.* 8.] By 1 & 2 Geo. 4, c. cxiv. s. 8, the churchwardens of a certain parish were directed and required in each and every year to make a rate for certain purposes "on the full annual rent or value" of all houses, &c., rated or rateable for the relief of the poor of the parish:—*Held*, that the words "full annual rent or value" were equivalent to "full net annual value," and that the rate could not be made on the gross

RATE—*continued.*
estimated rental, but only on the rateable value of the premises. ROSE *v.* WATSON - - **90**

—— Lighting rate — Coal mines — "Land"—"Houses, buildings, and property other than land" - - - - **11**
See LOCAL GOVERNMENT. 3.

RECEIPT—Bills of Sale Act—Possession—Husband and wife—Separate estate of wife
See BILL OF SALE. 2. [**18**

REGISTER—Registration—Bill of sale—Sale of goods—Receipt for purchase-money—Possession—Husband and wife - **18**
See BILL OF SALE. 2.

REMITTED ACTION—County court—Counterclaim for unliquidated damages—Power to order trial in County Court - **832**
See COUNTY COURT. 6.

—— County court — Jurisdiction — Action for unliquidated damages - - **332**
See COUNTY COURT. 5.

RES JUDICATA — Bankruptcy — Non-payment after service of bankruptcy notice—Refusal to make receiving order—Second bankruptcy notice in respect of same judgment debt - - - **387**
See BANKRUPTCY. 9.

—— Estoppel—Judgment—Highway—Liability to repair - - - - **108**
See HIGHWAY.

—— Joint contractor—Guarantee—Cheque given for liability on—Unsatisfied judgment on cheque—Action against joint contractor on guarantee - - **101**
See JOINT CONTRACTOR.

REVENUE—*Account Duty—Conversion of Realty into Personalty—Customs and Inland Revenue Act*, 1881 (44 & 45 *Vict. c.* 12), *s.* 38, *sub-s.* 2 (*c*). In 1885 by a voluntary settlement A. conveyed certain real estate to trustees on trust that they should on the request of A. and his wife or the survivor of them, and after the decease of the survivor, at their own discretion, sell such real estate and stand possessed of the proceeds in trust for A. for life, and after his death on certain trusts therein declared, and on failure of those trusts in trust for A., his executors, administrators, and assigns. A. died in 1887 without any such request having been made, and the real estate remained unsold;—*Held*, that it must be treated as having been converted into personalty by the voluntary settlement in 1885, and must, therefore, be included in an account and charged with duty under s. 38 of the Customs and Inland Revenue Act, 1881. ATTORNEY-GENERAL *v.* DODD - - **150**

2. —— *Excise—Proceedings to Recover Penalties—Information—Court of Summary Jurisdiction—Officer of Inland Revenue—Proof of Authority to take Proceedings*—7 & 8 *Geo.* 4, *c.* 53, *s.* 71—*Inland Revenue Regulation Act*, 1890 (53 & 54 *Vict. c.* 21), *ss.* 21, 24.] By 7 & 8 Geo. 4, c. 53, s. 71, where, in an information for excise penalties under that or any other Act, any allegation is made that the Commissioners of Excise had ordered such information to be exhibited, such allegation shall be sufficient proof, without any further or other evidence, of the fact so alleged

REVENUE—*continued.*

By the Inland Revenue Regulation Act, 1890, s. 21, proceedings shall not be commenced against any person for the recovery of any penalty under any Act relating to Inland Revenue, except by order of the commissioners; and, by s. 24, in any proceeding the letter or instructions under which an officer has acted shall be sufficient evidence of any order issued by the commissioners and mentioned or referred to therein.—Where proceedings to recover an excise penalty were taken by an officer of Inland Revenue before a court of summary jurisdiction:—*Held*, that the provisions of s. 71 of the Act of Geo. 4 were not impliedly repealed by ss. 21 and 24 of the Act of 1890, and therefore an allegation in the information that the officer prosecuted by order of the commissioners was sufficient proof of such order without further or other evidence. DYER *v.* TULLEY - 794

3. —— *Stamp—Bill of Exchange—Coupon for Payment of Interest on perpetual Bond—Re-issue of Coupons—Stamp Act*, 1870 (33 & 34 *Vict. c.* 97), *s.* 48, *Sched.—Revenue Act*, 1889 (52 & 53 *Vict. c.* 42), *s.* 16.] In 1881 the Hungarian Government issued bonds of perpetual obligation at 4 per cent. containing the following statement: "This bond is provided with a talon and interest coupons for ten years at the expiration of which the bearer of the talon will receive on delivery of the same a fresh coupon sheet with another talon." Coupons for ten years were attached to the talon and issued with the bond, such coupons being payable to bearer at the various places thereon specified. The talon merely contained a statement that in July, 1891, the Hungarian Government would deliver to the bearer new coupons and another talon. In July, 1891, the Hungarian Government accordingly issued new talons with coupon-sheets attached in the same form, mutatis mutandis, as the issue of 1881:—*Held*, that the new coupons were bills of exchange payable on demand, and that, since they were not attached to and issued with either the security or any agreement or memorandum for the renewal or extension of time for payment of the security, they did not fall within any of the exemptions provided by the Stamp Act, 1870, and s. 16 of the Revenue Act, 1889, and was therefore liable to be stamped with a 1*d.* stamp. ROTHSCHILD & SONS *v.* COMMISSIONERS OF INLAND REVENUE - 142

4. —— *Stamp—Medicine—"Held out or recommended to the Public"—"Public Notice or Advertisement"—Stamp Act*, 1804 (44 *Geo.* 3, *c.* 98), *Schedule B—Medicines Stamp Act*, 1812 (52 *Geo.* 3, *c.* 150), *ss.* 1, 2, *and Schedule.*] By the Medicines Stamp Act, 1812, s. 2, a penalty is imposed on any person who shall utter, vend, or expose to sale, any packet, &c., containing any of the drugs, &c., mentioned in the schedule, without a paper cover, duly stamped, denoting the duty charged.—The schedule includes all powders, tinctures, &c., to be used or applied as medicines for the prevention, cure, or relief of any disorder or complaint, incident to or affecting the human body, which are, by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, &c., containing the same, held out or recommended to the public by the makers, vendors, or proprietors, as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint, incident to or affecting the human body.—The special exemptions in the schedule include all medicinal drugs which shall be uttered or vended entire, without any mixture or composition with any other drug or ingredient, by any surgeon, apothecary, chemist, or druggist who hath served a regular apprenticeship, or by any other person licensed.—Informations were preferred against the respondents, a limited company, for selling a powder and a tincture without stamps.—The respondents issued a price-list, which was distributed gratis, and described the medicines as beneficial for certain specified ailments, and the bottle of tincture was wrapped in a handbill describing it in terms similar to those in the price-list:—*Held*, that, by distributing the price-list, the respondents had held out or recommended the medicines to the public, by a public notice or advertisement, as beneficial for the cure of disorders, within the meaning of the schedule, that it was not necessary that the notice or advertisement should be affixed to or delivered with the medicine, that the case did not come within the special exemptions, that the stamp duty was payable, and that the informations ought not to be dismissed. SMITH *v.* MASON & CO. [363

RIVER—*Pollution of River—Liability of Local Authority in respect of Old Sewers—Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10.] By the Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 3, "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. Where any sewage matter falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act, if he shews to the satisfaction of the Court having cognizance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling or flowing or carried into the stream."—The defendants, an urban sanitary authority, were charged under the above section with permitting sewage matter to flow into a stream within their district. It appeared that the sewage matter flowed from certain ancient sewers, within the district of and vested in the defendants, which had been constructed and which were used for discharging sewage matter into the stream before the passing of the Act, and before the defendants were constituted a sanitary authority. The defendants had made certain alterations in these sewers, but had done nothing to increase the pollution of the stream:—*Held*, that there was primâ facie evidence that the defendants had "wilfully permitted"

RIVER—*continued.*
sewage matter to flow into the stream, and that the mere fact that they had not materially altered the nature of the sewers, and had done nothing to increase the flow of sewage matter from such sewers into the stream, was not a sufficient answer to proceedings under the Act. YORKSHIRE WEST RIDING COUNCIL *v.* HOLMFIRTH URBAN SANITARY AUTHORITY - - - - C. A. 842

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SALE OF GOODS—Agreement for—Factors Acts—Hire and purchase agreement—Disposition of goods by person having agreed to purchase - - - - 262
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SEWER—"Wilfully permitting" sewage matter to flow into stream—Liability of local authority - - - - 842
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SHERIFF — Execution—Seizure—Possession by sheriff for twenty-one days—Payment out—Act of bankruptcy - - 690
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SHIP—*Merchant Shipping Acts—Offences—Overloading Ship—Liability of Owner for Act of Master—Merchant Shipping Act,* 1876 (39 *&* 40 *Vict. c.* 80), *s.* 28.] The owner of a British ship, which without his knowledge or assent is overloaded by the master in breach of the provisions of s. 28 of the Merchant Shipping Act, 1876, is not responsible for the act of the master so as to be liable to the penalty created by the section. MASSEY *v.* MORRISS - - - - - 412

SHORTHAND NOTE—County court—Appeal—Judge's note—Costs—Practice of City of London Court - - - 437
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SOLICITOR—*Lien—Charging Order—Assignment of Judgment Debt—Priority—Notice of Solicitor's Right to a Lien—"Purchaser for Value without Notice"—Solicitors Act,* 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.] A solicitor had acted for the plaintiff in an action, which was compromised on certain terms as to payment by instalments, judgment being given for the plaintiff. The plaintiff then assigned for valuable consideration the money payable to him under the compromise to a person who had been a witness in the action. It was not proved that express notice of the solicitor's claim was given to the assignee:—*Held,* that the provision in s. 28 of the Solicitors Act, 1860, avoiding conveyances to defeat a charging order, "unless made to a bonâ fide purchaser for value without notice," means, without notice of the solicitor's right to a lien, and not, without notice of the existence of a charging order, that the assignee of the judgment debt, being aware of the existence of the action, and that the solicitor was acting in it for the plaintiff, must be taken to have had notice of the solicitor's right to a lien on the property recovered in the action, and therefore was not a "purchaser for value without notice," within the meaning of the Act, and the solicitor was entitled to a charging order.—*Faithfull* v. *Ewen* (7 Ch. D. 495) followed.—*Hough* v. *Edwards* (1 H. & N. 171) questioned. COLE *v.* ELEY - - - - - - 180

2. —— *Lien—Charging Order—Assignment of Property recovered in an Action—Priority—Notice of Solicitor's right to a Lien—"Purchaser for Value without Notice."—Solicitors Act,* 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.] Sect. 28 of the Solicitors Act, 1860, provides for the making of an order declaring a solicitor employed in any suit, matter, or proceeding, in any court of justice, entitled to a charge upon the property recovered or preserved for his costs, and that all conveyances and acts done to defeat such charge shall,

SOLICITOR—*continued.*

"unless made to a bonâ fide purchaser for value without notice," be void as against such charge. —A solicitor had acted for the plaintiff in an action, which was compromised by the defendant's agreeing to pay a sum of money to the plaintiff by instalments. The plaintiff assigned for valuable consideration the money payable to him under the compromise to a person who had been a witness in the action. It was not proved that express notice of the claim of the plaintiff's solicitor for costs had been given to the assignee. Subsequently to the assignment the solicitor obtained a charging order upon the money recovered in the action for his costs:—*Held* (affirming the judgment of a Divisional Court) that the assignee, being aware that the subject-matter of the assignment to him was money recovered in an action, in which the solicitor had acted for the plaintiff, must be taken to have had notice of the solicitor's rights in respect of his costs, and therefore was not "a purchaser for value without notice" within the meaning of the Act; and consequently that the solicitor was entitled to a charge upon such money in priority to the assignee.—*Faithfull* v. *Ewen* (7 Ch. D. 495) followed. COLE *v.* ELEY [C. A. 350

—— County court—Solicitor—Clerk—Right of audience—Practice - - 440
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—— Summons for delivery up of client's papers—Originating summons - - 163
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SOLICITOR AND CLIENT—*Retainer in Common Law Action—Refusal of Solicitor to act further during Pendency of Action—Action for Costs previously incurred—Entire Contract.*] The contract of a solicitor who accepts a retainer in a common law action is, in the absence of agreement to the contrary, an entire contract to conduct the case of the client until the action is finished. He is not entitled, therefore, without good cause, on giving reasonable notice to his client, to decline to act further in the action for him, and thereupon sue for his costs in respect of the previous conduct of the client's case. UNDERWOOD, SON, & PIPER *v.* LEWIS - - - - - - C. A. 306

STAMP—Bill of exchange—Alteration—Stamp sufficient to cover amount of bill after alteration—Negligence—Estoppel 660
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TRAMWAY—*Purchase of Undertaking by County Council—Terms of Purchase—Valuation of Tramway—London Street Tramways Act*, 1870 (33 & 34 *Vict. c. clxxi.*), *s.* 44.] By s. 44 of the London Street Tramways Act, 1870 (which corresponds to s. 43 of the Tramways Act, 1870 (33 & 34 Vict. c. 78)), it is provided that the Metropolitan Board of Works may, after the expiration of twenty-one years from the passing of the Act, by notice in writing require the London Street Tramways Company to sell to them their undertaking upon the terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, materials and plant of the company, such value to be in case of difference determined by a referee nominated by the Board of Trade. The London County Council, who had succeeded to the powers of the Metropolitan Board of Works, gave notice under the foregoing section to purchase the company's undertaking:—*Held*, reversing the decision of the Divisional Court, that the value of the tramway upon a compulsory sale to the county council must be measured by what it would cost to construct it at the date of such sale, subject to a proper deduction in respect of depreciation. IN RE AN ARBITRATION BETWEEN LONDON COUNTY COUNCIL AND LONDON STREET TRAMWAYS COMPANY - - - C. A. 199

TROVER—*Conversion—Crossed Cheque—Banker collecting and handing over Proceeds.*] The payee of a crossed cheque specially indorsed it to the plaintiffs and posted it to them. A stranger, having obtained possession of the cheque during the course of transmission, obliterated the indorsement to the plaintiffs, and, having substituted a special indorsement to himself, presented it at the defendants' bank, and requested them to collect it for him. They did so, and handed the money over to him.—In an action for conversion by the plaintiffs:—*Held*, that the defendants were liable for the amount of the cheque. KLEINWORT, SONS & CO. *v.* COMPTOIR NATIONAL D'ESCOMPTE DE PARIS - - - 157

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